Supreme Court, U.S.
FILED

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No. 011233 FEB 13 2002

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# In the Supreme Court of the United States

Christine Mato,
*Petitioner,*

V.

Jack Baldauf, Dr.; Jeff Fox, Dr.; Texas A&M University System; Texas A&M University; and Texas A&M University Ocean Drilling Program,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CRIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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45.00

## QUESTION PRESENTED

Will the Court of Appeals for the Fifth Circuit be allowed to continue to circumvent this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S.Ct. 2097(2000),* under the guise of insufficiency of the evidence by ignoring and discrediting evidence favorable to plaintiffs?

## PARTIES TO THE PROCEEDINGS

**Petitioner**

Christine Mato

**Respondents**

Texas A&M University System and Texas A&M University

**Other Parties**

Texas A&M University Ocean Drilling Program, Dr. Jack Baldauf, Dr. Jeff Fox, and Dr. Rick McPherson were parties to the proceedings below and have no interest in the outcome of the petition.

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Christine Mato ("Mato") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 267 F.3d 444 (5th Cir. 2001), and is reproduced in Appendix B at A-3 to A-27. The opinion and judgment of the United States District Court for the Western District of Texas is unreported. The order of the court of appeals denying the petition for rehearing *en banc* is unreported and is reproduced in Appendix A at A-1 to A-2.

## JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was issued on October 9, 2001. A timely petition for rehearing *en banc* was denied by that court on November 16, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

## STATUTE INVOLVED

42 U.S.C. § 2000e-3(a) of Title V11, the Civil Rights Act of 1964, provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e3(a) (1994).

## STATEMENT OF THE CASE

### I. The Proceedings Below

Petitioner brought this action complaining, *inter alia*, that she was terminated and denied raises and promotions as a result of her complaining of sexual discrimination and for having assisted others in making complaints of sexual discrimination.

The jury concluded that Petitioner had indeed been targeted and terminated in retaliation for helping other female employees file sexual harassment complaints. The District Court subsequently entered judgment, awarding Petitioner $475,481 in damages (applying the statutory cap and adding prejudgment interest) and $50,047 in attorneys fees and costs.

Respondent appealed and the United States Court of Appeals for the Fifth Circuit reversed and remanded with instructions to dismiss with prejudice, finding that Petitioner had presented insufficient evidence from which a reasonable jury could have concluded; (1) that Respondent's proffered reason was pretextual, and (2) that the decision-maker was aware of Petitioner's protected activities. (App. B).

Petitioner subsequently requested rehearing *en banc* because the panel opinion abrogated and contravened this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000). However, the request was denied.

### II. Material Facts

From 1984 until 1996, Petitioner Christine Mato

("Mato") worked as supervisor of Curation and Repositories at Texas A&M University's Ocean Drilling Program ("ODP"). She was primarily responsible for archiving core samples of the earth's crust. ODP had a management structure that included a Director (Jeff Fox ("Fox")), an Associate Director (Jack Baldauf ("Baldauf")), and several managers, including the administrator, Rick McPherson ("McPherson"), who oversaw all personnel functions for all Texas A&M University ("A&M") ODP employees.

During her tenure at ODP, Mato actively assisted others in making reports of sexual harassment and confronted her own subordinates when they committed sexual harassment or discrimination. Mato's attempts to combat sexual discrimination in A&M's ODP were so well known that she was nicknamed "Frequent Flyer" by A&M's Human Resource Department, the agency responsible for sexual harassment complaints within A&M.

Beginning in 1992, Mato assisted several ODP employees in making complaints of sexual harassment and discrimination. Mato personally complained to Fox that she was being paid less than the white males. As a result of Mato's assistance with one complainant, a report was generated addressing concerns over sexual harassment at ODP. McPherson told Mato that this report would be an embarrassment to ODP and that she would never receive another raise at ODP. Mato never received another raise at ODP.

From 1992 until 1995, Mato requested raises from McPherson, who told her that all raises in ODP had been frozen. Mato discovered, however, that males within ODP were receiving raises despite the alleged "freeze." When Mato was denied a raise in 1995, she complained to Fox

and McPherson that she was suffering discrimination in her pay. Mato also complained that Baldauf failed to follow up in investigating another incident of sexual harassment. Baldauf admitted his "frustration" over Mato's involvement and her criticism.

On December 2, 1996, Mato was told that her employment with ODP had been terminated because her position had been eliminated as part of a cost-savings reorganization. Mato learned that a new position, "Curator," had been created which was essentially identical to her former position save for the addition of a Ph.D. requirement.

Mato applied for the so-called "new" position of Curator. Her application was processed through A&M's Human Resource Department and forwarded to the head of the search committee for ODP, Dr. Jamie Allan ("Allan"). Allan was prevented from considering Mato by Baldauf who stated that Mato could not be considered. The new Curator position was given to a white male, Dr. John Firth.

In order to carry out the reorganization in 1996, Fox appointed Baldauf as his "right hand man," telling the employees that the reorganization would be led by Baldauf and he would "be in charge of the reorganization activities." Jan Radle ("Radle"), as the personnel supervisor for ODP and a subordinate of McPherson, "coordinated" and "gathered information" for Baldauf. Radle worked closely with Baldauf in the reorganization, but was required to keep McPherson abreast of all critical issues. As part of her reorganization duties, Radle developed job descriptions referred to as Position Analysis Questionnaires, or "PAQs" for the new and eliminated positions. After she developed these PAQs, they would be reviewed by Baldauf and

forwarded to Karen Chavis at A&M's Human Resource Department

When Radle saw the job description for the "new" Curator position, she was concerned because it appeared to her that the Ph.D. requirement was designed to specifically exclude Mato. The job description for the "new" Curator position was identical to Mato's former position except for the addition of the Ph.D. requirement. When Radle asked Fox and Baldauf about Mato serving in the "new" position, both told Radle that Mato would never get the "new" position.

Karen Chavis, at Texas A&M's Human Resource Department, reviewed and returned the job description for the "new" Curator position with comments that the new position was essentially identical to Mato's former position, except for the addition of a Ph.D. requirement, and that it appeared that Mato was being specifically excluded. Radle discussed Chavis' concerns with both McPherson and Baldauf. McPherson responded that he was not surprised. When Baldauf was informed of Chavis' feedback, he took the job description and "massaged" the wording so that A&M's Human Resource Department would believe that the "new" Curator position was different from Mato's former position and would approve the altered description.

Baldauf also asked Radle to research curator positions nationwide in an attempt to justify the Ph.D. requirement. Radle discovered, however, that the only comparative position which had a Ph.D. curator was NASA's moon rock collection, but even there the Ph.D. was only preferred, not required, because NASA did not want to exclude qualified individuals already working as curators.

## REASONS FOR GRANTING THE WRIT

### I. The United States Court Of Appeals For The Fifth Circuit Continues To Resist This Court's Holding In *Reeves* That Sets Out The Evidentiary Standard In Discrimination Cases Proven Through Indirect Evidence

This Court's landmark decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) should have, once and for all, settled the issue of "the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id.* at 146, 120 S.Ct. 2097.

This Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148, 120 S.Ct. 2097. Such a showing will not always be sufficient to maintain a jury verdict; however, it will "*permit* the trier of fact to infer the ultimate fact of discrimination." *Id.* at 147, 120 S.Ct. 2097 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742 (1993)) (emphasis in original). Additionally, this Court emphasized the principle that a party's lack of credibility ("a suspicion of mendacity"), along with a factfinder's disbelief of the asserted justification, will strengthen the plaintiff' s case because it is a "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Id.* (citations omitted). This is but more "circumstantial evidence which is probative of intentional discrimination, and it may be quite persuasive." *Id.*

Along with clarifying the burden and the law regarding a showing of pretext, this Court also reissued clear guidance to the Courts of Appeals regarding sufficiency versus insufficiency of the evidence to be used in considering judgments as a matter of law:

> ... in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.

*Id.* at 150-151, 120 S.Ct. 2097 (citations and internal quotations omitted). This guidance to consider all the evidence and resolve all doubt in favor of the non-moving party (the party that won the verdict) can be fairly restated as a warning not to second guess the jury or more simply, "stay out of the jury box."

It is no secret that the Court of Appeals for the Fifth Circuit disagrees with this Court's holding and guidance in *Reeves.* Indeed, it was the Fifth Circuit's "misconception of petitioner's evidentiary burden" that this Court reversed in *Reeves. Id.* at 149, 120 S.Ct. 2097. The Court of Appeals has expressly acknowledged the holding in Reeves along with this Court's admonishment not to tamper with permissible jury findings. *Russell v. McKinney Hosp. Venture,* 235

F.3d 219, 223 n.4 (5th Cir. 2000) (stating "Rather we simply comply with the Supreme Court's mandate in *Reeves* not to substitute our judgment for that of the jury and not to unduly restrict a plaintiff's circumstantial case of discrimination." and "*Reeves* is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases."). However, despite this vow to comply with *Reeves*, the Court of Appeals has persisted in requiring more of a plaintiff than what is legally required, effectively raising the bar so that it is almost completely out of reach.

The Fifth Circuit has persisted in "substituting [their] judgment for that of the jury" and consistently found against discrimination plaintiffs usually, as in *Reeves*, under the guise of insufficiency of the evidence.

Evidence of ill will and discriminatory animus are routinely mischaracterized as "stray remarks," which are insufficient evidence of animus; evidence of damages is minimized or ignored; and evidence of pretext and causation are found insufficient. *E.g., Wallace v. Methodist Hospital System*, 271 F.3) 212 (5th Cir. 2001)(finding a decision-maker's answer to why plaintiff was fired, "First of all, she's been pregnant three times in three years" as a stray remark reasoning, "It is only if we infer that [the] reference to [plaintiff's] absences is code language for [plaintiff's] pregnancies that it relates to [plaintiff's] protected class,"and finding insufficient evidence of pretext despite disproof of one of two asserted justifications); *Auguster v. Vermillion Parish School Board*, 249 F.3d 400 (5th Cir. 2001) (requiring plaintiff to "establish pretext" to overcome summary judgment, and finding racial statements to be insufficient "stray remarks"); *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000) (reversing jury verdict

of discrimination by requiring proof of pretext plus additional direct evidence, reasoning that although the jury could have found the asserted reason to be a pretext, "all that it proves, however, is that [the] decision-makers had some unidentifiable reason for not wanting to hire [plaintiff]." Also reducing damages from the statutory cap to $10,000 based on insufficient evidence); *Rubenstein v. Tulane,* 218 F.3d 392 (5th Cir. 2000)(affirming dismissal of plaintiff's discrimination claim finding "Russian Jew" and "Russian Yankee" to be stray remarks, and finding insufficient evidence of damages, and absent the dismissed discrimination claim, cut the jury's award of punitive damages by two-thirds).

And now, evidence of pretext which is patently substantial is flatly ignored or discounted as mere "disagreement." (App. B at A-3 to A-27).

The net result is that the Court of Appeals rather than complying with this Court's admonishments in *Reeves,* continues to contravene *Reeves.* Plaintiffs who, under *Reeves* and the law, should prevail are routinely reversed or denied the chance to present their case.

## II. The Court Of Appeals Decision Contravenes *Reeves*

Applying the guidance of *Reeves* to the instant case results in an affirmation of the District Court's judgment. The Court of Appeals erred in finding insufficient evidence that the asserted justification was pretext, and further erred in finding insufficient evidence that the decision-maker was aware of Petitioner's activities. Both findings directly contravene *Reeves,* where this Court admonished the Court of Appeals for doing precisely what they have done here again.

### A. The Court Of Appeals *De Facto* Overrules *Reeves* By Disregarding Petitioner's Ample Evidence That The Asserted Justification Was In Fact A Pretext

In *Reeves,* this Court held that evidence of the falsity of the employer's pretext, particularly when accompanied by evidence of a party's dishonesty, can support a jury's verdict and will overcome a defendant's motion for judgment as a matter of law. Here, the Court of Appeals ignored all evidence that the asserted justification was a false pretext, *de facto* overruling *Reeves* in the Fifth Circuit.

Respondent's asserted reason for terminating Petitioner was that it was simply part of a cost savings reduction in force, with her curator position being eliminated in favor of a "new" Curator position which required a Ph.D. (App. B at A-19). However, there was more than adequate evidence, albeit circumstantial, that this Ph.D. requirement was a pretext to get rid of Petitioner.

Initially, there was ample evidence that the new position was the same as the old position. The testimony revealed that the new position was a carbon copy of Petitioner's former position, with the only real difference being the addition of a Ph.D. requirement. Petitioner, who has no Ph.D., had been performing virtually the same job for 12 years. Chavis, of A&M's Human Resources Department, also testified that the jobs were the same except for the Ph.D. requirement. Jan Radle, who was responsible for drafting the new job descriptions, testified that it was the same job.

The Court of Appeals ignored the testimony of Petitioner, Radle and Chavis that the jobs were the same and instead focused on the testimony of Jamie Allan, an

A&M supervisor, for their finding that the job was 80-90% the same. (App. B at A-12, A-19). However, as this Court reminded the Court of Appeals in overturning its decision in *Reeves,* the evidence must be viewed in a light most favorable to the prevailing party and the verdict.

That the jobs were the same except for the disqualifying Ph.D. requirement is evidence of pretext. Beyond the evidence that the positions were the same, there was also substantial evidence that there was no need for a Ph.D. in the position. While accepting Allan's testimony regarding the "80- 90%," the Court of Appeals chose to ignore his testimony that the duties of the new position did not require a Ph.D. Significantly, and again evidence ignored by the Court of Appeals, Chavis testified regarding her concerns about the validity of the Ph.D. requirement. Phillip Rabinowitz (Fox's predecessor), Allan (head of ODP's search for the "new" Curator), Chavis, Radle, and Mato all testified that the Ph.D. requirement was unnecessary. Also, the predecessor program to ODP had a curator without a Ph.D.

In direct contravention to the established law, the Court of Appeals, without discussion, accepted the disputed testimony of Fox that "almost all curators at similar repository programs hold a Ph.D." along with Baldauf's testimony that he was told that NASA's moon rock curator position required a Ph.D. (App. B at A-10). Radle testified that she conducted a nationwide search to determine whether any other programs required a Ph.D., finding that no other programs required one, and that only NASA's moon rock curator had a Ph.D., where it was merely *preferred,* not required. Just as this Court admonished in *Reeves,* the Court of Appeals has again "disregarded critical evidence favorable to petitioner," *Reeves,* 530 U.S. at 152, 120

S.Ct. 2097, by accepting the Respondent's testimony despite contradictory evidence favoring the Petitioner.

Most disturbing about the Court of Appeals' opinion is that it holds that a jury may not infer an asserted justification is pretextual where several witnesses who worked for the Defendant below arrived at just that inference. Here, witnesses who worked for A&M and were involved in the process, did in fact infer that the Ph.D. requirement was a pretext to get rid of the Petitioner.

Chavis, when informed of the Ph.D. requirement, asked Radle, "Are we specifically excluding Chris Mato from this?" Radle testified that the Ph.D. requirement appeared to specifically target Petitioner for termination. The Court of Appeals, again accepting a version disfavorable to Petitioner, stated that Radle "was concerned that the new Ph.D. requirement could be perceived as targeting Mato . . ." (App. B at A-9) However, Radle's actual testimony was:

> A: ... it appeared to me as if the pattern of these actions together might give the appearance that Ms. Mato was being specifically excluded.
> Q: Okay.
> A: Because it appeared to me as if she was.

She did not merely testify that it could be perceived as targeting Petitioner, but that she thought it was targeting Petitioner. Discounting the critical portion of Radle's testimony is hardly drawing reasonable inferences in Petitioner's favor.

Additionally, the jury was presented with Respondent's story that the reorganization was a cost savings

measure, a story apparently accepted by the Court of Appeals, (App. B at A-8), who again disregarded evidence favorable to Petitioner. The jury heard evidence that the reorganization of the curator positions actually cost Respondent more. As this Court stated, it is a "general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Reeves,* 530 U.S. at 147, 120 S.Ct. 2097. The panel opinion ignores this principle along with the evidence that the cost savings justification was untrue.

The evidence presented is far more than what the Court of Appeals whimsically discounts as registering disagreements with Fox's business plans. (App. B at A- 19). The evidence, although circumstantial, was more than sufficient for a jury to disbelieve the legitimacy of A&M's proffered reason for terminating Mato. There was evidence that her former job was the same as the supposedly "new" position. There was evidence that the new position did not need a Ph.D. and that *no* other such position in the world required one. There was evidence that the cost savings story was a lie. Most significantly, Radle, who wrote the job descriptions, and more so, Chavis, the Human Resource Director for A&M, both testified that the Ph.D. was just a pretext. But the Court of Appeals holds that this is insufficient. If the Respondent's own Human Resources Director can make the inference of pretext, how can it be said that a jury cannot? Save a confession or hidden videotape of a conspiracy, what stronger evidence could there be than Respondent's own employees concluding that the Ph.D. was a pretext?

Finally, the District Court, in his final paragraph denying Respondent's motion for new trial stated, "from the beginning [Respondent] put forth an unsupported and

extremely dubious justification for its conduct." In short, no one but the Court of Appeals for the Fifth Circuit has believed Respondent's pretext.

By requiring more, and apparently direct "smoking gun" evidence of pretext, the panel opinion contravenes this Court's holding in *Reeves* and should not stand.

### B. The Court Of Appeals Erred By Requiring Direct Evidence That The Decision Maker Was Aware Of Petitioner's Protected Activities Despite The Guidance In *Reeves* Which Expressly Does Not Require Direct Evidence

The Court of Appeals conceded that there was sufficient evidence that the jury could conclude that Baldauf and McPherson had the requisite improper motive based on their undisputed knowledge of Petitioner's protected activities. (App. B at A-7, 8, 16). The Court of Appeals, however, then concludes that there was insufficient evidence that Fox, the decision-maker, was aware of Petitioner's activities. (App. B at A-20). In doing so, the Court of Appeals misapplies the law and ignores the evidence which supports the conclusion that Fox was aware, or that Baldauf and McPherson were principally responsible.

Initially, there was evidence that Fox was personally aware of Petitioner's protected activities. Petitioner complained directly to Fox that she was being discriminated in her pay which was unequal to that of males. The Court of Appeals ignores this testimony. It was widely known that Petitioner frequently complained of sexual harassment and discrimination, such that she was referred to as a "Frequent Flyer" by A&M's Human Resources. The Court of Appeals fails to consider or address why Fox's knowledge cannot be

inferred from the widespread knowledge of Petitioner's activities.

While stating that the jury could have disbelieved Fox, the Court of Appeals nonetheless finds it uncontroverted that he was unaware of Petitioner's activities and accepts his testimony that the Ph.D. requirement was his and his alone because "there is no [direct] evidence that contradicts [his] testimony . . ." (App. B at A-17). However, as noted by the District Court in denying Respondent's post-trial motions, Fox never testified that he was unaware
of Petitioner's protected activities, but rather only that neither Baldauf nor McPherson told him about her protected activities. This is consistent with his knowledge coming from the common knowledge within the organization or from his personal experience.

Beyond this reasonable inference, a jury may, contrary to the Court of Appeals opinion, (App. B at A- 17 to 18), "consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Reeves,* 530 U.S. at 147, 120 S.Ct. 2097. And here there was ample evidence to doubt Fox's credibility. Significantly, Fox admitted, on cross, that he destroyed the early drafts of the reorganization plans which could have corroborated (or refuted) his claim that the Ph.D. requirement had been there from the outset. The District Court even noted for the record its doubts regarding Fox's credibility, stating," [i]ndeed, the Court had its own doubts during trial about the sincerity of Fox's testimony on various issues . . ."

Aside from Fox's personal knowledge, there was sufficient evidence for the jury to conclude that Baldauf and McPherson had enough leverage or influence over Fox as to be the actual decision-makers. The Court of Appeals

erroneously requires direct evidence of the exertion of such influence when circumstantial evidence is sufficient.

In *Reeves,* this Court found a sufficient nexus between the individual with the improper motive and the decision-maker based solely upon the fact that the two were married. *Reeves,* 530 U.S. at 152, 120 S.Ct. 2097 This Court found that the plaintiff had introduced sufficient evidence that Chesnut (who had the illegal motive) was "principally responsible for petitioner's firing." *Id.* at 151, 120 S.Ct. 2097. Addressing the evidence showing the nexus between Chesnut and the decision-maker, this Court held that the plaintiff had "introduced evidence that Chesnut was the actual decision-maker behind his firing," citing only to, "Chesnut was married to [the decision-maker], who made the formal decision to discharge petitioner." *Id.* at 152, 120 S.Ct. 2097. In other words, the evidence of causation was sufficient based solely on the evidence that the illegally motivated individual had the opportunity and motive to talk with and persuade the decision-maker. Notably, there was no direct evidence that they had discussed it. *See id*

Here, Petitioner's evidence of opportunity and motive are even stronger than that held sufficient in *Reeves.* Here we have the two architects for the reorganization meeting and working with Fox, the decision-maker, throughout the process. Baldauf and McPherson had the means (the reorganization), the motive (Petitioner's activities), and the opportunity (their interaction with Fox) to tell Fox about Petitioner's activities and persuade him to get rid of her. The Court of Appeals which should draw all reasonable inferences in the light most favorable to the verdict, instead infers a fictitious wall of silence between Fox and Baldauf and McPherson despite evidence of opportunity. While there is no "smoking gun" of any incriminating discussions,

this evidence of means, motive, and opportunity is at least as strong as the marriage found sufficient in *Reeves.*

As in *Reeves,* the Court of Appeals has again "disregarded critical evidence favorable to [Petitioner]" and "discredited [Petitioner's] evidence that [Baldauf and McPherson] [were] the actual decision maker[s]." *See Reeves,* 530 U.S. at 152, 120 S.Ct. 2097.

## III. The Question Presented is Important

The ability of an employee suffering discrimination to seek redress is an issue of importance to this Court and the nation. That Congress passed and maintains the Civil Rights Acts is evidence enough that discrimination has and does exist, and that the will of the people is that an employee who suffers retaliation for opposing it should have a remedy. It goes without saying that a remedy which is unobtainable is no remedy at all. As demonstrated above, however, that is the state of the law in the Fifth Circuit.

Attorneys within the Fifth Circuit are left in the unenviable position of counseling clients who have suffered discrimination and retaliation. An evaluation of any given case under the law may result in an accurate assessment of a "strong case," while a practical (Fifth Circuit) evaluation will invariably lead to the opposite assessment. These cases have become far too tenuous to take on a contingency basis and there are few clients (most of whom were fired) who have the financial resources to pay as they go. Congress provided for the award of attorneys fees to successful claimants, but no fees are awarded to plaintiffs who, although successful before the jury of twelve, fall prey to the "jury of three" in New Orleans. The end result is that despite Congress' attempt to encourage redress (through the award of

attorneys fees and costs) and enforce civil rights, there will be fewer and fewer attempts to right these wrongs.

Practical counsel will avoid taking these cases on contingency, and honest counsel must advise against them to paying clients.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted to ensure that it is discrimination, and not the redress of discrimination, which eventually becomes extinct.

Respectfully submitted,

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50522

FILED **NOV 16 2001**

CHRISTINE MATO
Plaintiff - Appellee-Cross-Appellant

V.

JACK BALDAUF, DR; ET AL
Defendants

JACK BALDAUF, DR; JEFF FOX, DR; TEXAS A&M UNIVERSITY SYSTEM; TEXAS A&M UNIVERSITY, TEXAS A&M UNIVERSITY OCEAN DRILLING PRO GRAM
Defendants - Appellants-Cross-Appellees

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Appeals from the United States District Court for the Western District of Texas, Austin

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ON PETITION FOR REHEARING EN BANC

(Opinion 10/9/01, 5 Cir.,_____. F.3d_____)

Before GARWOOD, JOLLY, and DeMOSS, Circuit Judges.

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PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. R and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

SEE FRAP AND LOCAL
**RULES 41 FOR STAY OF THE MANDATE**

ENTERED FOR THE COURT:

/S/ E. Brady Jolly
United States Circuit Judge

Judge Higginbotham did not participate in the consideration of the petition for rehearing en banc.

REHG-6a

## APPENDIX B

12 of 120 DOCUMENTS

**CHRISTINE MATO, Plaintiff-Appellee-Cross-Appellant, versus JACK BALDAUF, DR; ET AL., Defendants JACK BALDAUF, DR; JEFF FOX, DR; TEXAS A&M UNIVERSITY SYSTEM; TEXAS A&M UNIVERSITY; TEXAS A&M UNIVERSITY OCEAN DRILLING PROGRAM,**

**Defendants-AppellantsCross-Appellees**

**No. 00-50522**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

***267 E3d 444; 2001 U.S. App. LEXIS 21572; 86 Fair EmpL Prac. Cas. (BNA) 1597***

**October 9, 2001, Decided**

**SUBSEQUENT HISTORY:**

[**1] Rehearing and Rehearing En Banc Denied November 16, 2001, Reported at: 2001 US. App. *LEXIS* 25349.

**PRIOR HISTORY:**
Appeals from the United States District Court for the Western District of Texas.

**DISPOSITION:**
REVERSED and REMANDED.

## CASE SUMMARY

**PROCEDURAL POSTURE:**
Defendant university and plaintiff terminated employee filed cross appeals from a jury verdict and award of damages and attorney's fees in the employee's favor. The university argued that the employee failed to prove sufficient evidence of a causal connection between her activity protected under Title VII of the Civil Rights Act of 1964, 42 *U.S.C.S. § 2000e* et seq., and her discharge from employment.

**OVERVIEW:**
At trial, the jury found that the university terminated the employee in retaliation for helping female employees file sexual harassment complaints, and awarded her damages for lost wages and pain and suffering. The evidence was undisputed that the employee, who did not have a doctorate, performed almost all curatorial duties in her program. When the program was reorganized, she was terminated because the requirements of her position were revised to require a doctorate degree. The court of appeals noted that, in sustaining a retaliation claim, the employee had the burden of proving she would not have been terminated "but for" her helping other women file grievances based on sexual harassment. The court found she had not met the burden, largely because the program director who had developed the reorganization plan was not linked to any of the harassment claims. She could not prove that one of the officials involved in the harassment had prevailed upon the director

to fire her, or that the stated reasons for the reorganization were pretextual.

**OUTCOME:**
The judgment was reversed and remanded and the complaint dismissed. The employee failed to present sufficient evidence to support a causal connection between her protected activity and her discharge.

**COUNSEL:**
For CHRISTINE MATO, Plaintiff - Appellee-Cross-Appellant: Gaines F West, James Hans Barcus, Lanny D Ray, West, Webb, Allbritton, Gentry & Rife, College Station, TX.

For JACK BALDAUF, DR, JEFF FOX, DR, TEXAS A & M UNIVERSITY SYSTEM, TEXAS A&M UNIVERSITY, TEXAS A&M UNIVERSITY OCEAN DRILLING PROGRAM, Defendants - Appellants- Cross-Appellees: James C Todd, Assistant Attorney General, Office of the Attorney General for the State of Texas.

Austin, TX.

**JUDGES:**
Before GARWOOD, JOLLY, and DeMOSS, Circuit Judges.

**OPINION BY:**
E. GRADY JOLLY

**OPINION:**

**[*446]**

E. GRADY JOLLY, Circuit Judge:

A jury found that Texas A&M University terminated Christine Mato's employment in retaliation for helping female employees file sexual harassment complaints, and then awarded Mato approximately $ 216,000 for lost wages and $ 250,000 for pain and suffering. The district court entered judgment and awarded Mato attorneys' fees and posts in the amount of $ 50,000, which was less than one-fourth of what she had requested. Both parties have appealed. Texas A&M contends that (1) Mato failed to provide sufficient evidence of a causal connection between her protected Title V11 activity and her discharge from employment; and (2) Mato's evidence regarding pain and suffering cannot justify the size of the jury's mental anguish award. Mato has filed a cross-appeal, contending that the district court abused its discretion by reducing her request for attorneys fees. We conclude that Mato has failed to present sufficient **[*447]** evidence to support a causal connection between her protected **[**2]** activity and her discharge. We therefore reverse and remand for entry of a judgment dismissing the complaint.

## I

Texas A&M University coordinates the science operations for the Ocean Drilling Program ("ODP"). ODP is an international research project whose drilling vessel sails around the world and obtains core samples from the ocean floor.

Christine Mato was ODP's "Supervisor of Curation and Repositories" from 1984 to 1996. Mato's primary responsibilities were archiving ODP's collection of core samples and reviewing scientists' requests to conduct research on certain samples. According to the 1996 organizational chart, Mato was directly responsible to Dr. Russ Merrill, the "Manager of Information Services and Curation." It is generally agreed, however, that Merrill focused on information services and delegated almost all his curatorial duties to Mato.

Between 1990 and 1995, Mato helped five female coworkers file internal sexual harassment complaints against certain members of ODP staff. Although most of the allegations were relatively non-serious (such as crude humor), one complaint against a drilling superintendent on the ship led to a serious internal investigation of sexual [**3] harassment at ODP.

Mato testified that Rick McPherson, a Texas A&M administrator who supervised personnel functions at ODP, told her that the report was an embarrassment to the program and that she would not receive any pay raises in the future. (McPherson denies making these statements, but we must assume the jury found otherwise.) Indeed, Mato did not receive a raise between 1993 and 1996. Although she had been informed that salaries were frozen, Mato testified that some male employees at ODP had received pay raises during this period.

In 1993, Mato complained that Jack Baldauf, the associate director at ODP, was not responding in a timely

manner to one of the allegations of sexual harassment. Baldauf admitted at trial that he was "frustrated" with Mato's criticism because he believed he was pursuing the matter expeditiously.

Mato contends that, as a result of her involvement in these five incidents of sexual harassment between 1990 and 1995, her employment was terminated when ODP was reorganized in December 1996.

The reorganization plan was developed by Jeff Fox, who became the director of ODP in June 1995. The evidence is undisputed that the international committee that oversees **[**4]** ODP believed the program was operating inefficiently. Throughout late 1995 and early 1996, Fox circulated memoranda to his managers and staff, warning them that budget cuts were likely.

In June 1996, Fox decided to thoroughly reorganize ODP in order to make the program more efficient and economical. Fox hired a consulting firm, American Management Consultants ("AMC"), to study ODP and to recommend changes. Fox placed Jack Baldauf in charge of carrying out the reorganization process. At Fox's request, Baldauf was assisted by Jan Radle, an assistant to Rick McPherson.

Baldauf testified that he worked closely with Fox on the reorganization plan. According to Baldauf, Fox decided at the outset that it was necessary to consolidate the curatorial positions occupied by Mato and Dr. Merrill and to require the new curator to have a Ph.D. Baldauf testified

that Fox never sought his advice regarding this decision; instead, Fox made the decision himself at a very early stage in the **[*448]** process. Fox himself testified without contradiction, and without challenge, that the decision to require a Ph.D. for the new curator position was his, and his alone. He further testified without contradiction, and **[**5]** without challenge, that he had no discussions with Baldauf or McPherson about the Ph.D. requirement before making the decision. James Allen, who headed the search committee for the new curator, testified that Fox was responsible for the reorganization plan, and that Baldauf was merely carrying out a plan that had already been formulated.

As Baldauf s assistant during the reorganization period, Jan Radle helped develop Position Analysis Questionnaires ("PAQs"), or job descriptions, for positions within ODP. Radle testified that their initial description of the new curator position was virtually identical to the job description for the "Supervisor of Curation and Repositories" (Mato's position), except that the new curator would be required to have a Ph.D.

Radle was concerned that the new Ph.D. requirement could be perceived as targeting Mato, who has only a bachelor's degree and some graduate study. When Radle voiced her concerns to Baldauf and Fox, they told her directly that Mato would not become the new curator. Radle also testified that McPherson wanted to be kept abreast of the reorganization and that he was pleased when she told him about the impending changes in the curatorial **[**6]** division.

After formulating the PAQ for the new curator position, Radle then forwarded the proposed PAQ to Karen Chavis at the Texas A&M Human Resources department. Chavis testified that she wondered why the ODP was creating a new curatorial position with duties very similar to those performed by Mato, who apparently was going to be laid off. Chavis then called a "risk assessment" meeting with Fox and Baldauf.

Baldauf testified that during this interview with Human Resources, Fox explained that he thought the Ph.D. requirement was necessary in light of ODP's focus on research and science operations. Moreover, Fox pointed out that almost all curators at similar repository programs hold a Ph.D., regardless of whether a Ph.D. is specifically required in the job description. Nevertheless, the Human Resources representatives advised Fox and Baldauf to determine the job requirements for curators in similar programs.

At Baldauf s request, Radle and Dr. Merrill contacted the NASA Moon Rocks program to determine whether NASA:s curators were required to hold a Ph.D. Baldauf testified that Merrill told him that a Ph.D. was required at NASA, Radle testified, however, that a representative from [**7] NASA said that a Ph.D. was "preferred" but not required because a strict Ph.D. requirement would have excluded some of the people already serving as NASA curators. We must assume the jury believed Radle's version.

Radle also testified that after the risk assessment meeting, Baldauf "massaged" the job description to make

the Ph.D. requirement appear more justifiable. At some point, Baldauf added several new duties (such as developing a long-range sample distribution policy) that required "interacting with the science community" and exercising "proper scientific oversight" over the technical staff.

By the end of October 1996, Baldauf and Radle had prepared the final PAQ for the new curator position, and the Human Resources department approved the proposed Ph.D. requirement.

During this same period from June to October, the consultants from AMC were **[*449]** preparing their recommendations. In a lengthy report submitted on November 1, 1996, AMC suggested that the curation services be more closely aligned with the Science Operations division of ODR The report noted that "Management of the curation function must carefully balance providing the maximum science that can be obtained from the [core **[**8]** samples] while preserving them for decades until new scientific technology enables even more information to be gleaned. The head of this function must combine in-depth scientific knowledge with adroit management and people skills to achieve this balance." AMC's first recommendation, therefore, was to "Reassign Curation. Services to Science Operations with a scientist as the division head." Although the consultants' report does not mention a Ph.D. requirement, Fox interpreted AMC's recommendation for a "scientist" to require a Ph.D.-credentialed research scientist who had published extensively in peer-reviewed journals. On cross-examination, Mato attempted to discredit the consultants' recommendation by gaining an admission from

Fox that he had met with the consultants regularly as they were conducting their research and developing their report.

ODP's reorganization plan was made public in December 1996. The plan eliminated 14 positions, created 5 positions, modified 16 positions, and relocated 40 positions within the program. (To put the scope of the reorganization in perspective, we note that ODP had approximately 160 employees as of mid- 1996)

The plan eliminated the positions **[**9]** held by Merrill and Mato. Dr. Merrill remained at the ODP to head the information services division, while Mato was ineligible for the newly created position of curator because she did not have a Ph.D. Several of Mato's witnesses -such as Dr. Jamie Allan, the acting director of science operations; and Dr. Phillip Rabinowitz, the former director of ODP - expressed the opinion that the Ph.D. requirement was unnecessary because 80 to 90% of the new curator's duties were identical to those that Mato had performed.

The Ph.D. requirement notwithstanding, Mato applied for the new curator position but was not considered for the job. The following month, the ODP hired a research scientist with a Ph.D., Dr. John Firth, as its new curator.

**II**

In December 1998, Mato filed this employment discrimination action against Jeff Fox, Jack Baldauf, Rick McPherson, the Texas A&M University System, Texas A&M University, and the University's Ocean Drilling

Program. The case went to trial in February 2000. The district court entered judgment as a matter of law for the defendants on Mato's Equal Pay Act claim. By the time the case was presented to the jury, only one defendant (Texas A&M University) and **[**10]** two Title VII claims (sex discrimination and retaliation) remained.

The jury found no discrimination based on sex, but it did find that University Officials discharged Mato in retaliation for helping other female employees file sexual harassment claims. The jury awarded Mato approximately $ 216,000 in compensatory damages and $ 250,000 for pain and suffering.

The district court modified the judgment by adding prejudgment interest to a back pay award and reducing the award slightly to comply with Title VII statutory caps. The district court denied Texas A&M's motion for a new trial as well as its motion to reduce the jury award. Mato then filed a motion seeking attorney's fees and costs in excess of $200,000, but the district court **[*450]** awarded only $50,047.76. The University appeals the jury's verdict on retaliation and the damages award. Mato cross-appeals as to the attorney's fee award, but not as to the judgment as a matter of law on her Equal Pay Act claim or as to the verdict on her sex discrimination claim.

## III

We need only resolve the first issue presented on appeal, whether Mato introduced sufficient evidence to allow a jury to find a causal connection between her

protected **[**11]** activities and her discharge from employment.

A

Title VII makes it unlawful for an employer to retaliate against an employee "because [that employee] has opposed any practice made an unlawful employment practice by this subchapter...." *42 U.S.C § 2000-3(a).* To prevail on her Title VII retaliation claim, Mato had to prove, *inter alia,* that a causal connection existed between the protected activity and the adverse employment action. See *Messer v. Meno, 130 F. 3d 130, 140 (5th Cir 1997),* cert. denied, *525 U.S. 1067, 142 L. Ed 2d 657, 119 S. Ct.* 794 *(1999).* We will therefore focus on the protected activity that she proved: encouraging and assisting other women to file sexual harassment complaints; and on the retaliation she claims: requiring a Ph.D. for the curator's position and the consequential termination of her employment, Mato had the burden, then, of proving she would not have been terminated "but for" her helping other women file grievances based on sexual harassment. See *Seaman. v. CSPH, Inc., 179 F.3d 297, 301 (5th Cir 1999); Rubinstein v. Administrators of Tulane Educ. Fund, 218 F.3d 392, 402-03 (5th Cir 2000)* **[**12]** ("Even if a plaintiffs protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct."), cert. denied, *121 S. Ct. 1393 (2001).*

In establishing this causal connection, Mato must first identify who made the decision that resulted in her

termination. For example, *Long v. Eastfield College, 88 F. 3d 300 (5th Cir 1996),* involved an executive officer, on the one hand, with the final authority to fire employees but who had no retaliatory animus toward the plaintiff, and, on the other hand, intermediate supervisors who appeared to have had an improper retaliatory intent and who recommended that an employee be fired. We explained that the causal link between the protected conduct and termination is broken where the official with final authority to fire employees conducts an "independent investigation" in the course of reaching his or her decision. Id. *at 307.* The causal link is not broken, however, where the decision maker "rubberstamps" the firing recommendation of subordinates; **[**13]** in such cases, we say that the decision-maker acts as a conduit of the subordinates' improper motive. Id.; see also *Russell v. McKinney Hospital Venture, 235 F. 3d 219, 22627 (5th Cir 2000)* ("If the [plaintiff] can demonstrate that others had influence or leverage over the official decisionmaker, ... it is proper to impute their discriminatory [or retaliatory] attitudes to the formal decision maker."). Of course, the degree to which the executive's decision was based on his or her own independent evaluation is a question of fact. *Long, 88 F. 3d at 307.*

Texas A&M contends that it is entitled to judgment as a matter of law because Mato presented insufficient evidence of causation. We will disturb a jury **verdict, [*451]** however, only if we conclude that, after viewing the trial record in the light most favorable to the verdict, there is no "'legally sufficient evidentiary basis' for a reasonable jury to have found for the prevailing party." *Stokes v. Emerson Elec. Co., 217 F. 3d 353, 356 (5th Cir 2000)(quoting Boeing Co. v. Shipman, 411 F.* 2d 365 *(5th* Cir. 1969)(en banc)).

B

In the light of Long v. Eastfield College, **[**14]** the first step is to determine whether Fox decided independently that the new curator should be required to have a Ph.D., or whether Fox's decision regarding the Ph.D. requirement resulted from the influence of Baldauf and McPherson, who, we shall assume, were motivated, by retaliatory animus.

According to the district court, 'It was Mato's theory that at least two of these A&M representatives–McPherson and Baldauf (Fox's right-hand man in planning the ODP reorganization) – were in fact 'responsible for her discharge' because they successfully prevailed upon Fox to terminate Mato." Stated more precisely, perhaps, Mato contends that they prevailed upon Fox to insist upon the Ph.D. requirement to create a pretext for terminating Mato. But from a review of the record, this does not appear to be the case. We agree that Mato produced ample evidence that Baldauf and McPherson were significantly responsible for developing and implementing the decisions of Fox during the reorganization process. But Mato has produced no evidence that would allow a jury to conclude that either of them were responsible for the decision to require the new curator to have a Ph.D.

Mato contends that she presented **[**15]** considerable evidence that Baldauf and McPherson were indeed responsible for her discharge. Mato relies exclusively on Jan Radle's testimony that Baldauf was "in charge of ODP'S reorganization activities"; that Baldauf helped

develope the PAQ for the new curator position and "massaged" the job description after meeting with Human Resources; and that McPherson appeared pleased with the results of the reorganization plan. Radle's testimony, however, does no more than merely confirm what is essentially undisputed and we fully accept for the purposes of our analysis: that Baldauf and (to a much lesser extent) McPherson were involved in the reorganization process. But we may not extrapolate simply from their involvement in the process that Baldauf and McPherson were responsible for Mato's termination. Radle's testimony, in other words, does not permit a jury to infer that Baldauf and McPherson exercised such influence over Fox that he was only a conduit for their improper retaliatory motives.

In fact, Radle's testimony on the question of who made the relevant employment decision is consistent with the unequivocal testimony of Baldauf and Fox - that Fox made the decisions regarding **[**16]** the curatorial positions quite early in the reorganization process and that Fox never consulted with Baldauf before deciding to require a Ph.D. for the new curator position. Indeed, there is no evidence that contradicts the testimony that the idea to require a Ph.D. for the position of curator originated with Fox and Fox alone. The undisputed testimony simply established that Fox placed Baldauf in charge of carrying out his mandates, including the Ph.D. requirement. In this connection, it was Baldauf s responsibility to develop the necessary job descriptions to accommodate Fox's reorganization plans.

To be sure, the jury may have disbelieved much of the testimony of Fox and Baldauf. It is settled, however,

that "disbelief of a witness's testimony is not sufficient **[*452]** to carry a plaintiffs burden." *Travel host, Inc. v. Blandford, 68 F.3d 958, 965 (5th Cir 1995).* As we have indicated, no witness testified, nor has Mato seriously suggested, that the requirement for the Ph.D. originated with anyone other than Fox. A reasonable fact finder could draw only one inference from the evidence in this record: Dr. Jeff Fox, ODP's director, independently made the initial and **[**17]** basic decision that adversely affected Christine Mato - that is, to consolidate the curatorial positions and require that the new curator hold a Ph.D.

C

The next question, then, is whether Mato presented sufficient evidence that her protected activities had the necessary causal connection to Fox's ultimate decision to implement the Ph.D. requirement, which resulted in Mato's termination. Stated in terms of the relevant case law, does the evidence permit a finding that "but for" Mato's protected activities, Fox would not have required a Ph.D. for the curator's position?

Mato presented no direct evidence of retaliatory animus on the part of Fox. Mato contends, though, that a jury could have inferred the fact of retaliation from the falsity of Texas A & W's proffered explanation for terminating Mato's employment. This court has held that the familiar McDonnell Douglas burden-shifting framework applies in Title VII retaliation cases. See *Rios v. Rossotti, 252 F.3d 375, 380 (5th Cir 2001); Rubinstein, 218 F.3d at 401- 02.* As the Supreme Court explained in *Reeves v. Sanderson*

*Plumbing Products, Inc., 530 U.S. 133, 148, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000);* **[**18]** a plaintiff must present "sufficient evidence" for a jury to reasonably conclude that the employees justification is unworthy of credence and is a pretext for discrimination or retaliation. See Crawford v. *Formosa Plastics Corp., 234 F. 3d 899, 902-03 (5th Cir 2000).*

Texas A&M's asserted reason for terminating Mato's employment may be summarized as follows. Because of pressure to improve its operations and cut its budget, ODP's new director formulated a comprehensive reorganization plan. The overriding theme of Fox's reorganization plan was its focus on science operations. Along these lines, Fox decided that the two curatorial positions needed to be consolidated and that the department should be headed by a Ph.D. -credentialed research scientist. A consulting firm reached virtually the same conclusion. Because Mato was not a research scientist who had earned a Ph.D., she was not eligible for the new curatorial position.

A review of the record makes plain that Mato failed to present sufficient evidence that would allow a jury to conclude that this reorganizational decision was phony and a pretext to retaliate against Mato. Mato's argument focuses on her belief that **[**19]** a Ph.D. was not required because she had performed almost all of the same duties for the previous twelve years. It is certainly true that Mato's witnesses established that 80 to 90% of the new curator's duties were identical to those performed by Mato and that, in their opinion, the Ph.D. requirement was unnecessary. However, we have repeatedly and emphatically stated that anti-discrimination laws "are not vehicles for judicial

second-guessing of business decisions." *Deines v. Texas Dept. of Protective & Regulatory Serv., 164 F.3d 277, 281 (5th Cir 1999).* In this case, Mato and her witnesses have done nothing more than register their disagreement with Fox's business plans for ODR

Moreover, Mato failed to present any evidence that Fox even knew that Mato had helped female co-workers file sexual **[*4531** harassment claims. The record indicates that all five incidents of sexual harassment occurred between 1991 and early 1995 - before Fox became the director of ODP. Fox testified that neither Baldauf nor McPherson had discussed Mato's activities with him, and Mato failed to show that Fox had learned about Mato's activities from any other source. Mato thus presented no evidence **[**20]** from which a jury could reasonably infer that Fox knew about the sexual harassment complaints that Mato bad helped file.

A final consideration is the period of time that elapsed between the last filing of a sexual harassment complaint and the reorganization plan that led to Mato's termination. The fact that approximately a year and a half passed between the last sexual harassment complaint and Mato's termination does not support an inference of retaliation. See, e.g., *Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 268 (5th Cir 1994)*(noting that a ten-month lapse between the plaintiffs complaint and her termination from employment "suggests that a retaliatory motive was highly unlikely").

In sum, Mato has fallen short of presenting sufficient evidence to permit a jury to reasonably infer that

ODYs justification for the Ph.D. requirement is unworthy of credence, that is, phony, and a pretext for retaliation. See *Crawford, 234 F.3d at* 903. The evidence does not support a finding that "but for" Mato's protected activities, Fox would not have consolidated the curatorial positions and required the new curator to hold a Ph.D.

IV

Having **[**21]** studied the full trial record, and viewing the evidence in the light most favorable to the verdict, we conclude that Texas A&M was entitled to judgment as a matter of law because Mato presented insufficient evidence of a causal connection between her protected Title VII activities and her termination from employment. For the foregoing reasons, the judgment is REVERSED and the case is REMANDED for entry of a judgment dismissing the complaint.

REVERSED.

# OPPOSITION

# BRIEF

Supreme Court, U.S.
FILED
MAY 16 2002

No. 01-1233

# In the Supreme Court of the United States

CHRISTINE MATO,
*Petitioner*,

v.

DR. JACK BALDAUF; DR. JEFF FOX; TEXAS A&M UNIVERSITY SYSTEM; TEXAS A&M UNIVERSITY; AND TEXAS A&M UNIVERSITY OCEAN DRILLING PROGRAM,
*Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether Mato presented sufficient evidence for the jury to infer the ultimate fact of retaliation under the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 503 U.S. 133 (2000)?

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No. 01-1233

# In the Supreme Court of the United States

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CHRISTINE MATO,
*Petitioner*,

v.

DR. JACK BALDAUF; DR. JEFF FOX; TEXAS A&M UNIVERSITY SYSTEM; TEXAS A&M UNIVERSITY; AND TEXAS A&M UNIVERSITY OCEAN DRILLING PROGRAM,
*Respondents*.

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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## RESPONDENTS' BRIEF IN OPPOSITION

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Respondents submit this brief in opposition to the petition for writ of certiorari and ask that certiorari be denied. Christine Mato sued her employer under Title VII after she was terminated as part of a comprehensive reorganization that eliminated 14 positions and retooled 65 others. Mato alleged that this reorganization was a pretext for retaliation against her because she helped other employees file sexual harassment

complaints against the employer. The jury agreed. The Fifth Circuit reversed the verdict because Mato set forth no direct evidence of retaliation and no sufficient evidence, direct or indirect, to establish that her employer's nondiscriminatory reason for her termination was a pretext for retaliation. *See Mato v. Baldauf*, 267 F.3d 444 (CA5 2001).

Mato invites the Court to exercise its jurisdiction alleging that the court of appeals thumbed its nose at the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). However, court of appeals's decision does not conflict with *Reeves*. In reality, Mato asks the Court to exercise its discretionary jurisdiction to reweigh the sufficiency of the indirect evidence presented in this case. This case does not warrant the Court's review, and the Court should deny the petition.

## STATEMENT OF FACTS

Respondents dispute numerous misstatements of fact set forth in the petition and point out the perceived misstatements throughout this brief. *See* SUP. CT. R. 15(2). The true nature of the testimony presented at trial, and the proper inferences to be drawn from this testimony, are seriously disputed.

Texas A&M University coordinates the science operations of an international research project called the Ocean Drilling Program ("ODP"). Pet. App. B, at A-6. Petitioner Christine Mato, ODP's "Supervisor of Curation and Repositories" from 1984 to 1996, cataloged and archived the core samples from the oceans' floors that were collected by ODP drilling vessels and she reviewed scientists' requests to conduct research on these samples. Pet. App. B, at A-7.

Mato's supervisor, Dr. Russ Merrill, was the "Manager of Information Services and Curation." Dr. Merrill focused his attention on information services and delegated almost all of his curatorial duties to Mato. Pet. App. B, at A-7.

In 1996, Dr. Jeff Fox, the director of ODP, developed a reorganization plan to cut costs and make ODP more efficient because its international oversight committee "believed the program was operating inefficiently." Pet. App. B, at A-8. Fox hired an outside consulting firm, American Management Consultants, to study ODP and to recommend changes. Pet. App. B, at A-8.

Dr. Fox placed Dr. Jack Baldauf "in charge of carrying out the reorganization process." Pet. App. B, at A-8. He asked that Jan Radle, an assistant to Rick McPherson at the Texas A&M Research Foundation ("TAMRF"), assist Dr. Baldauf. Pet. App. B, at A-8. Neither Radle nor McPherson were ODP employees; however, Radle drafted job descriptions for and supervised personnel functions at ODP. Pet. App. B, at A-9. Contrary to the allegation in the petition, Pet. at 3, McPherson was not an administrator within ODP management.

At the start of the reorganization process, Dr. Fox decided "that it was necessary to consolidate the curatorial positions occupied by Mato and Dr. Merrill and to require the new curator to have a Ph.D." Pet. App. B, at A-8, A-9. Dr. Fox never discussed the Ph.D. requirement with Dr. Baldauf or McPherson before making the decision. Pet. App. B, at A-9.

While researching and drafting the job descriptions for the new positions to be created during the reorganization, Radle noticed that the description of the new curatorial position was virtually identical to the description of Mato's position, except

that the new position required a Ph.D. Radle was concerned the new Ph.D. requirement could be perceived as targeting Mato, who had only a bachelor's degree. Pet. App. B, at A-9.

Radle voiced her concern to Dr. Baldauf and Dr. Fox and forwarded the job descriptions to Karen Chavis at the Texas A&M Human Resources Department. Chavis called a "risk assessment" meeting with Dr. Baldauf and Dr. Fox. Pet. App. B, at A-10.

At trial, Dr. Fox explained his reasons for requiring the curator to have a Ph.D. First, Dr. Fox believed the Ph.D. requirement was critical in light of ODP's focus on research and scientific operations. Pet. App. B, at A-10. Second, he believed that almost all curators at similar repository programs, like the meteorite collection at the Smithsonian Museum of Natural History, had Ph.D.'s, regardless of whether the job description required a Ph.D. Pet. App. B, at A-10. Before approving the Ph.D. requirement, however, Human Resources advised Dr. Fox and Dr. Baldauf to review job requirements for curators in similar programs.

At Dr. Baldauf's request, Radle and Dr. Merrill contacted the NASA Moon Rocks program. Pet. App. B, at A-10. Radle testified that NASA "preferred," but did not require, curators to have a Ph.D.

After the risk assessment meeting, Dr. Baldauf edited the curator job description to explain the Ph.D. requirement—*e.g.*, exercising "proper scientific oversight" over technical staff and "interacting with the science community." Pet. App. B, at A-11.

After Dr. Baldauf and Radle prepared the final description for the new curator position, Human Resources approved the Ph.D. requirement. Pet. App. B, at A-11.

The outside consultants hired by Dr. Fox made similar recommendations for the curation department: "Management of the curation function must carefully balance providing the maximum science that can be obtained from [core samples] while preserving them for decades until new scientific technology enables even more information to be gleaned. The head of this function must combine in-depth scientific knowledge with adroit management and people skills to achieve this balance." Pet. App. B, at A-11. In particular, the consultants recommended "reassign[ing] curation services to Science operations with a scientist as the division head." Although the report does not mention a Ph.D. requirement, Dr. Fox interpreted the recommendation for a "scientist" to require a Ph.D.-credentialed research scientist. Pet. App. B, at A-11.

ODP announced its comprehensive reorganization plan in December 1996. At the time, ODP employed approximately 160 persons. As a result of the reorganization, 9 employees were terminated, 5 vacant positions were eliminated, 5 new positions were created, and 60 other positions were altered. Pet. App. B, at A-12.

The plan combined the curation positions held by Dr. Merrill and Mato into one new curation position. Dr. Merrill remained at ODP to head the information services department; however, Mato was not eligible for the new curator position because she did not have a Ph.D., and Mato's employment

was terminated. Pet. App. B, at A-12. ODP hired a research scientist with a Ph.D. as its new curator. Pet. App. B, at A-12.

In 1998, Mato filed this lawsuit under Title VII, claiming that ODP fired her in retaliation for having helped five female employees file sexual harassment complaints against ODP between 1990 and 1995. Pet. App. B, at A-12, A-13.[1]

As a result of Mato's assistance with one particular sexual harassment complaint, a report was generated addressing concerns over sexual harassment at ODP. According to Mato, McPherson told her that the report was an embarrassment to ODP. Pet. App. B, at A-7. Mato also complained that Dr. Baldauf was not responding in a timely manner to one of the allegations of sexual harassment. Pet. App. B, at A-7, A-8. This assistance in filing sex complaints ceased months before Dr. Fox arrived to head ODP. Pet. App. B, at A-20.

Mato claims the entire reorganization was a pretext just to terminate her for having assisted others in filing harassment claims. In the petition, Mato states that "she was terminated *. . . as a result of her complaining of sexual discrimination*

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1. In addition, Mato, a woman of Hawaiian descent, alleged Title VII race and gender discrimination claims as well as an Equal Pay Act claim, a Title IX claim, and claims under §1981 and §1983. Prior to trial, the district court granted partial summary judgment in favor of Respondents on Mato's Title IX, §1981, and §1983 claims. At the close of Mato's case, the district court granted partial judgment as a matter of law in favor of Respondents on her Equal Pay Act and Title VII race discrimination claims. In its verdict, the jury denied Mato's gender discrimination claim. Resp. App. A, at A-1.

***and*** for having assisted others in making complaints of sexual discrimination." Pet. at 2 (emphasis added). This is incorrect. As the verdict clearly demonstrates, the jury was only asked if ODP retaliated against Mato for "helping others complain of sexual harassment or discrimination"—not for having personally complained of any harassment or discrimination. *See* Resp. App. A, at A-3.

The jury found that ODP terminated Mato in retaliation for helping other female employees file sexual harassment claims and awarded over a half million dollars, including $216,000 in compensatory damages, $250,000 for pain and suffering, and over $50,000 for attorneys' fees. Resp. App. A, at A-4.

## SUMMARY OF ARGUMENT

Contrary to the allegations set forth in the petition, the Fifth Circuit is not routinely defying the Court's decision in *Reeves* by disregarding circumstantial evidence favorable to employees in Title VII cases. In this case, Mato simply failed to establish any direct evidence of retaliation or sufficient circumstantial evidence to demonstrate that the reason for her termination was a pretext for retaliation. Carefully following the guidance provided by the Court in *Reeves*, the appeals court reviewed the circumstantial evidence favorable to Mato and concluded the evidence was insufficient to permit a jury to infer retaliation.

The only question presented in this case is whether the indirect evidence presented by Mato was sufficient to infer the ultimate fact of retaliation. Mato has not alleged a circuit split on this evidentiary issue. *See* SUP. CT. R. 10(a), 10(b). And, as the Court noted in *Reeves*, whether indirect evidence is sufficient to sustain a jury verdict is necessarily answered on

a case-by-case basis, depending on the strength of the prima facie case, the probative value of the proof that the employer's explanation is false, and other undisputed evidence supporting the employer's case. *See Reeves*, 530 U.S., at 148-49. Thus, the decision in this fact-bound case would be of little, if any, precedential value. Accordingly, this case does not warrant the Court's review. Indeed, review of this case would be particularly inappropriate given the disputed nature of the evidence presented on appeal. In sum, the Court should deny the petition for writ of certiorari.

## ARGUMENT

Under Title VII, it is unlawful for an employer to retaliate against an employee "because [she] has opposed any practice made an unlawful employment practice by [Title VII]." *See* 42 U.S.C. §2000e-3(a). In the absence of direct evidence of retaliation, the *McDonnell Douglas* framework establishes the allocation of the burden of production in retaliation cases. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *see also Reeves* 530 U.S., at 142.

Under this framework, the plaintiff must first establish a prima facie case of retaliation. *See Reeves*, 530 U.S., at 142. To establish this prima facie case, the plaintiff must show that: (1) she engaged in protected activity; (2) her employer took an adverse employment action against her; and (3) a causal connection existed between the protected activity and the adverse employment action. *Messer v. Meno*, 130 F.3d 130, 140 (CA5 1997). If the plaintiff establishes her prima facie case of retaliation, then the burden shifts to the employer to produce evidence that the adverse decision was made for a legitimate, nondiscriminatory reason. *See Reeves*, 530 U.S.,

at 142. This burden is one of production, not persuasion. *Id.* After the employer produces sufficient evidence of a nondiscriminatory reason for the employment action, the *McDonnell Douglas* framework disappears. *See id.*, at 142-43 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993)). At that point, the only issue to decide is whether the employer intentionally discriminated against the plaintiff. *Id.*, at 143. After trial, this is the only issue presented on appeal.

The plaintiff may attempt to show—by a preponderance of the evidence—that the legitimate, nondiscriminatory reason offered by the employer is not true and is unworthy of credence, *i.e.*, a pretext for retaliation. *Id.* The jury's rejection of the nondiscriminatory reason proffered by the employer, however, "does not *compel* judgment for the plaintiff." *Id.*, at 146 (emphasis in original). The ultimate question is still "whether the employer intentionally discriminated, and proof that the 'employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.'" *Id.*, at 146-47 (quoting *St. Mary's Honor Ctr.*, 509 U.S., at 524).

Therefore, the jury's rejection of the employer's proffered reason may permit the trier of fact "to infer the ultimate fact of discrimination": "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.*, at 147 (quoting *St. Mary's Honor Ctr.*, 509 U.S., at 511).

But proof that the employer's explanation is unworthy of credence "is simply one form of circumstantial evidence that is probative of intentional discrimination," that may, or may not, be persuasive. *Id.* And, as this Court expressly noted in *Reeves*, a jury's disbelief of the employer's proffered reason is not always adequate to sustain a jury's verdict:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the [employer's proffered] explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.*, at 148-49.

In this case, Dr. Fox—independently and with the advice of outside consultants—decided to combine the two positions held by Dr. Merrill and Mato into one curation job requiring a Ph.D., as part of the comprehensive reorganization of ODP that, in total, eliminated 14 jobs and altered 60 other positions.

Mato contends the entire reorganization and the Ph.D. requirement was a ruse to terminate her for assisting other employees in filing sexual harassment claims. However, Mato presented no evidence that Dr. Fox was aware of her protected activity before deciding that the reorganization should occur or that the curator should hold a Ph.D. In fact, there is little to no circumstantial evidence showing that ODP's legitimate, nondiscriminatory justification for her termination was a pretext for retaliation. Clearly, given the weakness of the evidence of pretext or retaliation, if any, and the strength of the uncontroverted evidence supporting ODP's decision to require a Ph.D. for the curation position, it was appropriate for the court of appeals to reverse the jury's verdict and enter judgment as a matter of law in this case.

## I. THE JURY'S REJECTION OF ODP'S NONRETALIATORY EXPLANATION AND THE WEAK CIRCUMSTANTIAL EVIDENCE OF PRETEXT, IF ANY, ARE INADEQUATE TO SUSTAIN THE JURY'S VERDICT.

In reviewing the jury verdict in this case, the Fifth Circuit —as admonished by this Court in *Reeves*—considered not only the evidence establishing the prima facie case, but also the evidence and inferences properly drawn from the evidence that ODP's explanation was a pretext for retaliation. The court of appeals did not ignore evidence favorable to Mato; to the contrary, the court of appeals expressly viewed the trial record "in the light most favorable to the verdict," *i.e.*, in favor of Mato. *See* Pet. App. B, at A-15. Nevertheless, the court of appeals properly concluded that Mato failed to present sufficient evidence that her protected activity had any causal connection to Dr. Fox's decision to require a Ph.D. for the curation position, which resulted in Mato's termination.

On appeal, without any direct evidence of retaliation, Mato attempted to establish that ODP's nondiscriminatory reasons for the reorganization and requiring a Ph.D. were a pretext for retaliation because she assisted other employees with filing sexual harassment complaints against ODP. However, this circumstantial evidence was insufficient to sustain the jury's inference of the ultimate fact of retaliation.

Mato's circumstantial evidence of pretext, if any, is weak. Mato pointed to five bits of circumstantial evidence that she claimed were sufficient to sustain the jury verdict. However, Mato mischaracterizes the true nature of much of this indirect evidence as well as the inferences that may properly be drawn from this evidence. And the remaining circumstantial evidence, if any, is insufficient to show that ODP's explanation for the termination is false and insufficient to infer the ultimate fact of retaliation.

First, Mato maintains that Radle and Chavis "testified that the Ph.D. requirement was just a pretext" for retaliation. Pet. at 13. However, neither Radle nor Chavis so testified at trial.

Instead, Chavis stated that she reviewed the plan of reorganization for possible retaliation or discrimination and concluded that there was none in this reorganization plan. Resp. App. B, at B-2.[2] And, as recognized by the court of

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2. In her petition, Mato asks: "If the Respondent's own Human Resources Director [Chavis] can make the inference of pretext, how can it be said that a jury cannot?" Pet. at 13. This, however, is misleading. To be accurate, Chavis was the "Employee Relations Manager," not the "Human Resources Director at A&M." *See* Resp. App. B, at B-1.

appeals, Radle reviewed the job description for possible problems and expressed her "concern that the new Ph.D. requirement *could be perceived as targeting Mato*." Pet. App. B, at A-9 (emphasis added). Radle, however, did not testify that she believed the Ph.D. requirement was a pretext for retaliation. Indeed, the passage quoted in the petition is misleading and taken out of context. When asked if she "felt that Ms. Mato was being specifically targeted," Radle did not agree, and, instead, she answered, "I said -- my words were -- pretty close -- that it appeared to me as if the pattern of these actions together might give the appearance that Ms. Mato was being specifically excluded." Resp. App. C, at C-1.

Prior to the reorganization, Radle was required to review the new job descriptions and flag any descriptions that *could be perceived* as problematic. The plan of reorganization combined the two existing curation jobs into one position, and the description of the new job eliminated one of the two existing curation employees from consideration for the new position. Not surprisingly, Radle flagged this job description for further review by the human resources department. However, her response to the Ph.D. requirement is neither direct nor indirect evidence of alleged pretext for retaliation. Indeed, Chavis, in human resources, reviewed the Ph.D. requirement and concluded that there was no illegal retaliation in the reorganization plan. In sum, the testimony of Chavis and Radle is not only insufficient to support the jury's findings but actually undermines those findings.

Second, Mato claims that the "cost savings" justification for the reorganization "was a lie" and, thus, constituted indirect evidence of retaliation. Pet. at 12-13. Mato, however, again skews the undisputed facts. As a result of the

reorganization, the two positions held by Dr. Merrill and Mato were fused into one full-time position focusing exclusively on curation. The new position required a Ph.D. and commanded a higher salary attributable to the curation division. Thus, the creation of the new position alone did not technically result in cost savings to the curation division at ODP. However, the reorganization did result in overall cost savings to ODP as a whole. Although one witness stated he did not think the reorganization resulted in savings, at trial, Fox demonstrated the savings with actual numbers. Resp. App. D, at D-1-D-7. Moreover, Mato did not present, and could not have presented, any evidence to suggest that the reorganization did not result in increased efficiency as designed.

Moreover, Mato ignores the second undisputed "overriding theme of Fox's reorganization plan," *i.e.*, "its focus on science operations." Pet. App. B, at A-19. Mato does not and cannot refute this nondiscriminatory justification, and this independent justification for the Ph.D. requirement alone could serve as a basis for terminating Mato. Thus, there is no evidence to refute Dr. Fox's science-operations justification for the reorganization, and insufficient evidence to conclude that the cost-savings justification "was a lie" constituting evidence of retaliation against Mato.

Third, Mato claims the Ph.D. requirement was a pretext because the job descriptions for the old and the new curator position were virtually identical except for the requirement of the Ph.D. Pet. at 11. Mato points to the testimony of Dr. Fox's predecessor, Phillip Rabinowitz, and Jamie Allan that the Ph.D. requirement was "unnecessary." However, as the Fifth Circuit properly noted, Mato, Rabinowitz, and Allan simply disagree with Dr. Fox's business plan and his focus on

science operations. Pet. App. B, at A-19, A-20. Evidence that others may not consider a Ph.D. absolutely necessary to perform curation functions is no evidence of pretext.

Fourth, in the petition, Mato contends the jury could have inferred that Fox knew of Mato's protected activity because she "personally complained to Fox that she was being paid less than white males." Pet. at 3. However, Mato never lodged that complaint. At trial, Mato did not testify that she complained to Fox that she was being paid less than white males. In fact, at trial, she confirmed her deposition testimony that she never complained of gender discrimination in her pay. Mato only complained to Dr. Fox about not getting a raise. Resp. App. E, at E-1, E-2. At trial, Mato admitted that she did not compare her salary to the salaries of her fellow white, male employees. Not surprisingly, the jury did not credit this testimony and rejected Mato's gender discrimination claims. Moreover, as noted above, the jury was not asked whether ODP retaliated against Mato because she personally complained to Fox about gender disparities in salary—the jury was asked only if ODP retaliated against Mato for helping fellow employees file sexual harassment claims. Thus, Mato's complaint to Dr. Fox regarding her salary is no evidence of retaliation.

Fifth, it is undisputed that Mato's protected activity ended before Dr. Fox arrived at ODP, and there was no evidence to suggest that Fox knew of Mato's protected activity. Likewise, it is undisputed that Dr. Fox, and Dr. Fox alone, decided that the new curator should be required to have a Ph.D. Indeed, as the Fifth Circuit noted, Mato never seriously suggested that the Ph.D. requirement "originated with anyone other than Fox." Pet. App. B, at A-18.

Nevertheless, in the petition, Mato suggests the jury could have inferred that Fox was aware of Mato's protected activity and retaliated against her (1) because Baldauf and McPherson knew of her activity and were either responsible for her discharge or could have told Dr. Fox of the protected activity; and (2) because Fox "destroyed early drafts of the reorganization plans which could have corroborated (or refuted) his claim that the Ph.D. requirement had been there from the outset." Pet. at 14-17, 15.

Although the jury could have concluded that Dr. Baldauf and McPherson were aware of Mato's protected activity, the jury could not reasonably infer that either was responsible for her discharge or that either prevailed upon Fox to terminate Mato. As the court of appeals noted, it was undisputed that Dr. Baldauf and McPherson "were responsible for developing and implementing the decisions of Fox during the reorganization process." *See* Pet. App. B, at A-16. However, Mato failed to present any evidence to permit the jury to conclude that Dr. Baldauf or MacPherson were responsible "for the decision to require the new curator to have a Ph.D.," or to terminate Mato. In fact, Dr. Fox and Dr. Baldauf both testified—without contradiction—that Dr. Fox, and Dr. Fox alone, decided to require the new curator to have a Ph.D.

In the petition, Mato suggests the jury could have inferred that Dr. Baldauf or McPherson was the actual decisionmaker, because the jury was presented with facts similar to the facts reviewed by the Court in *Reeves*. This is incorrect. In *Reeves*, the employee introduced independent evidence from a fellow employee that Chesnut, the person who made derogatory, age-based comments to the employee and treated him disparately from his fellow employees, was the one who "exercised

'absolute power' within the company for '[a]s long as [he could] remember.'" *See Reeves*, 530 U.S., at 152. In addition, Chesnut was the husband of the woman who made the formal decision to fire the employee. From this evidence, the Court concluded the jury could have reasonably found that Chesnut was the actual decisionmaker and could have attributed his retaliatory motives to his wife. By contrast, in this case, there is no evidence suggesting that Dr. Baldauf or McPherson influenced Dr. Fox's decision to require a Ph.D. or terminate Mato. As the court of appeals properly concluded, the jury could not "extrapolate simply from their involvement in the [reorganization] process that Dr. Baldauf and McPherson were responsible for Mato's termination." Pet. App. B, at A-17. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001).

Mato also claims that the jury could have disbelieved Dr. Fox's testimony that Dr. Baldauf and McPherson did not influence his decision to require a Ph.D. for the new curation position because Dr. Fox "destroyed the early drafts of the reorganization report that could have confirmed (or refuted) his claim that the Ph.D. requirement had been there from the outset." Pet. at 15. This is not supported by the evidence. In reality, Dr. Fox discarded an early, incomplete draft of a report from the outside consultants hired to make suggestions for the plan of reorganization. The incomplete report from the consultants would have neither confirmed nor refuted Dr. Fox's claim that the Ph.D. requirement "had been there from the outset." Dr. Fox's disposal of the draft report is no evidence to doubt his credibility or to infer that Dr. Fox retaliated against Mato.

At most, the circumstantial evidence in this case shows that the job descriptions for the old and new curator positions were virtually identical except for the Ph.D. requirement. Mato can show no evidence of Dr. Fox's mendacity. Standing alone, even coupled with the jury's disbelief of Dr. Fox's proffered explanation, this circumstantial evidence falls far short of evidence sufficient to support the jury's conclusion that Dr. Fox changed the curator's job requirements to retaliate against Mato.

## II. MATO PRESENTS NO REASON FOR THE COURT TO EXERCISE ITS JURISDICTION BECAUSE THE COURT OF APPEALS DID NOT DECIDE AN IMPORTANT QUESTION OF LAW IN A WAY THAT CONFLICTS WITH THE COURT'S DECISIONS OR DECISIONS OF OTHER FEDERAL COURTS.

The only question presented in this case is whether the indirect evidence presented by Mato was sufficient to infer the ultimate fact of retaliation. Mato has not alleged a circuit split on this evidentiary issue. *See* SUP. CT. R. 10(a), 10(b). And whether indirect evidence is sufficient to sustain a jury verdict is necessarily answered on a case-by-case basis, depending on the strength of the prima facie case, the probative value of the proof that the employer's explanation is false, and other undisputed evidence supporting the employer's case. *See Reeves*, 530 U.S., at 148-49. Thus, the decision in this fact-bound case would be of little, if any, precedential value. Accordingly, this case does not warrant the Court's review.

Moreover, throughout her petition, Mato suggests that the "Fifth Circuit disagrees with this Court's holding and guidance in *Reeves*." Pet. at 7, 8, 17-18. Citing three Title VII cases the court of appeals reversed for insufficient evidence,

Mato maintains that sustaining a Title VII verdict on appeal is not possible in the Fifth Circuit. Pet. at 8 ("[T]he Court of Appeals has persisted in requiring more of a plaintiff than what is legally required, effectively raising the bar so that it is almost completely out of reach."), 17-18 ("It goes without saying that a remedy which is unobtainable is no remedy at all. As demonstrated above, however, that is the state of the law in the Fifth Circuit."). Notwithstanding Mato's hyperbolic statements, however, the Fifth Circuit has adopted the *Reeves* framework for reviewing Title VII cases. Mato's claim that the Fifth Circuit repeatedly ignores the *Reeves* framework in order to rule in favor of employers is simply unsupportable.

Whether circumstantial evidence is sufficient to sustain a jury's verdict will vary from case to case depending on the strength of the evidence presented. Therefore, it should not be at all surprising that Mato identified three cases in which the Fifth Circuit reversed jury verdicts over the last two years.[3]

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3. *See* Pet. at 8-9 (citing *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212 (CA5 2001), *pet. for cert. filed*, 70 U.S.L.W. 3597 (U.S. Mar. 5, 2002) (No. 01-1358); *Rubenstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392 (CA5 2000), *cert. denied*, 532 U.S. 937 (2001); *Vadie v. Miss. State Univ.*, 218 F.3d 365 (CA5 2000), *cert. denied*, 531 U.S. 1113 (2001)). Mato cites a fourth case, *Auguster v. Vermillion Parish School Board*, 249 F.3d 400, 404 (CA5 2001), as another example of the Fifth Circuit's rejection of a Title VII claim for insufficient evidence; however, in *Auguster*, the Fifth Circuit sustained the Title VII jury verdict in favor of the employee because the Court found the employee presented direct evidence of discrimination.

However, Mato overlooks several cases in which the Fifth Circuit affirmed Title VII judgments or reversed summary judgment in favor of employers because the district court erroneously concluded that indirect evidence and disbelief of an employer's justification would not permit the jury to infer discrimination or retaliation. *See, e.g., Pratt v. City of Houston*, 247 F.3d 601 (CA5 2001) (reversing summary judgment for the City in Title VII discrimination case because the jury could have inferred discrimination from the evidence of the prima facie case and sufficient indirect evidence supporting the jury's disbelief of the City's non-discriminatory reason under a *Reeves* analysis); *Oden v. Oktibbeha County*, 246 F.3d 458 (CA5), *cert. denied*, 122 S.Ct. 341 (2001) (affirming the jury's compensatory damage award in Title VII discrimination case under a *Reeves* analysis).

In fact, the Fifth Circuit recently reaffirmed its duty to follow *Reeves* and uphold jury verdicts under Title VII when presented with sufficient indirect evidence of retaliation. In *Gee v. Prinicipi*, No. 01-50159, 2002 WL 597374 (CA5 Apr. 18, 2002), Gee was employed as a pharmacist at a hospital. After Dr. Bryan, the chief of staff, passed her inappropriate notes that expressed romantic overtures, Gee reported him to the hospital director, who reassigned her. Two years later, the government announced the hospital would be integrated with its other medical centers in the area.

At a reorganization meeting, management discussed Gee's role in the new organization and discussed appointing her to a new position in a different department. At the meeting, Dr. Bryan expressed concerns regarding Gee's "inability to get along with others." Another doctor questioned her use of sick

leave. Dr. Gibb, who attended this meeting, was designated to appoint someone to fill the new position. Gee and one other person applied; Gee was not selected. At first, Gibb explained his decision by stating that "although Gee had proficient technical skills, he was concerned about her ability to work effectively with others." 2002 WL 597374, at *1.

At the district court, Gee attempted to demonstrate the reason for the hiring decision proffered by Dr. Gibbs was pretextual by showing that his testimony was internally inconsistent and conflicted with the recollections of other witnesses. Although the district court acknowledged that Gee's evidence "cast doubt" on Dr. Gibb's reason for not hiring her, the district court still granted summary judgment for the employer.

Although there was no direct evidence to suggest that Dr. Bryan directed Gibbs not to select Gee, the court of appeals held that, drawing all reasonable inferences in favor of Gee, a jury could conclude that Dr. Bryan improperly influenced the decision process with his negative comments at the staff meeting. Therefore, the Fifth Circuit found Gee satisfied her prima facie burden, and, following *Reeves*, reversed the district court's grant of summary judgment:

> We take note, however, of the Supreme Court's explanation that a factfinder may infer the ultimate fact of retaliation from the falsity of the explanation. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48, 120 S.Ct. 2097 (2000). In such cases, a plaintiff may withstand a motion for summary judgment without adducing additional, independent evidence of retaliation. This case provides a

> straightforward application of this standard. The Secretary has offered a plausible nonretaliatory explanation for Gee's nonselection. Gee, however, has provided sufficient evidence to case doubt on this explanation, thereby enabling a reasonable factfinder to conclude that it was false and that the decision not to hire her was already made by the end of the key meeting. Resolution of this dispute is properly within the province of the trier of fact, and therefore summary judgment was inappropriate.

2002 WL 597374, at *4.

Clearly, the Fifth Circuit has adopted the *Reeves* test for adjudicating cases in which the employee sufficiently rebuts the employer's nondiscriminatory reason for the employment decision. Indeed, even in the petition, Mato admits the Fifth Circuit had adopted the *Reeves* framework for reviewing Title VII cases. *See* Pet. at 7-8 (citing *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 233 n.4 (CA5 2000)).

In this case, Mato simply disagrees with the Fifth Circuit regarding the sufficiency of the circumstantial evidence she presented. Unlike Gee, however, Mato did not present sufficient evidence that Dr. Fox was aware of her protected activity before deciding on the Ph.D. requirement, and virtually no circumstantial evidence demonstrating that Dr. Fox's reason for requiring a Ph.D. was untrue or a pretext for retaliation. Given the absence of or weakness of any evidence of pretext or retaliation and given the uncontroverted independent evidence supporting ODP's decision to require a Ph.D. for the curation position, the court of appeals properly reversed the jury's verdict in this case, which is a result

specifically permitted by the Court in *Reeves*. *See Reeves*, 530 U.S., at 148.

## CONCLUSION

For these reasons, Respondents urge the Court to deny the petition for writ of certiorari to the Fifth Circuit Court of Appeals.

Respectfully submitted,

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May 16, 2002

# APPENDIX A

[Jury Verdict Form Filed March 3, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| CHRISTINE MATO | § | |
| | § | |
| VS. | § | NO. A 98-CA-825 SS |
| | § | |
| TEXAS A&M UNIVERSITY | § | |

## VERDICT FORM

We, the jury, unanimously answer the following questions by a preponderance of the evidence:

**QUESTION ONE**

Do you find from a preponderance of the evidence that Texas A&M University intentionally discriminated against Christine Mato on the basis of her gender by discharging her?

Answer "yes" or "no":

ANSWER: NO

If you answered "yes" to Question One, proceed to Question Two. If you answered "no" to Question One, proceed to Question Three.

**QUESTION TWO**

Do you find from a preponderance of the evidence that defendant Texas A&M University would have discharged Ms. Mato in the absence of gender discrimination?

Answer "yes" or "no":

ANSWER: _____

**QUESTION THREE**

Do you find from a preponderance of the evidence that Texas A&M University retaliated against Ms. Mato for helping others complain of sexual harassment or discrimination by discharging her?

Answer "yes" or "no":

ANSWER: YES

If you answered "yes" to Question Three and/or Question One, proceed to Question Four. If you answered "no" to both Question Three and Question One, then answer no further questions.

**QUESTION FOUR**

What sum of money, if paid now in cash, would fairly and reasonably compensate Christine Mato for the damages she has sustained as a result of Texas A&M University's decision to discharge her?

Answer separately in dollars and cents, if any.

a. Loss of wages and benefits from the date of her discharge, December 2, 1996, until the present date.

$ 156,660.00

b. Present value of any future lost wages and benefits.

$ 59,997.00

c. Emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life she suffered from the date of her discharge, December 2, 1996, until the present date.

$ 250,000.00

d. Present value of any emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life she will, in all probability, suffer in the future.

$ 0

Submitted the 3rd day of March 2000 at 12 o'clock 20 .m.

/s/
PRESIDING JUROR

# APPENDIX B

[Excerpt from trial transcript dated February 29, 2000, of Karen Geneva Chavis]

[Vol. 5:269-294]

Karen Geneva Chavis

having been first duly cautioned and solemnly sworn to tell the truth, the whole truth, and nothing but the truth was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. CANTRELL:

Q. What was your position at Texas A&M University in 1992 to 1996?

A. I was the Employee Relations Manager.

## CROSS EXAMINATION

BY MS. WILSON:

Q. Now, in 1996, did you -- you reviewed these reorganization documents for ODP, right?

A. Yes.

Q. Why were you reviewing the documents?

A. Because it was part of the reorganization package for a reduction in force -- reduction in force was included in the reorganization, and as the employer relations manager, it was my job to look at RIFs.

Q. And what were you looking for?
A. I was looking to ensure that the university's policies and procedures were being followed appropriately. I was looking to see that generally fairness was being applied in the analysis.
Q. In terms of fairness, if an employee was not being treated fairly in your estimation, what kind of issues did you look at then? Were there ever any EEO issues involved in reviewing reorganization documents?
A. Oh, yes, we looked to make sure that people were not being discriminated against illegally.
Q. So part of your job was to look for discrimination and retaliation?
A. Yes.
Q. Did you see any in this particular reorganization?
A. No.
Q. Now, you reviewed this particular position, correct? I'm sorry. The curator's position?
A. Yes.

# APPENDIX C

[Excerpt from trial transcript dated February 29, 2000, of Janice Ann Radle]

[Vol. 5:254]

Janice Ann Radle

having been first duly cautioned and solemnly sworn to tell the truth, the whole truth, and nothing but the truth was examined and testified as follows:

DIRECT EXAMINATION

Q. Did you also say to both Dr. Fox and Dr. Baldauf that you felt that Ms. Mato was being specifically targeted?
A. I said -- my words were --
Q. Okay.
A. -- pretty close, that it appeared to me as if the pattern of these actions together might give the appearance that Ms. Mato was being specifically excluded.
Q. Okay.
A. Because it appeared to me as if she was.

# APPENDIX D

[Excerpt from trial transcript dated March 1, 2000, of Paul Jeffery Fox]

[Vol. 6:409-415]

Paul Jeffery Fox

having been first duly cautioned and solemnly sworn to tell the truth, the whole truth, and nothing but the truth was examined and testified as follows:

CROSS EXAMINATION

BY MS. WILSON:

Q. Why was it important to you to have a Ph.D. in that position?

A. It was important to me, first and foremost, from an organizational point of view, the previous structure had had the curator, whom you've heard about, Russ Merrill, who represented the -- who had the ultimate authority and direction over curation, was a recognized research scientist but was somewhat distant from the day-to-day activities.

Chris Mato, as we heard, carried out the majority of those day-to-day activities. There was a separation. I felt that that created inefficiencies, and I wanted to marry the ultimate responsibility, the professional training, the education and the expertise and wisdom that comes with that with the task and responsibilities and the daily

functions that Ms. Mato or the supervisor of curation carried out.

So I wanted to consolidate them into one integrated functional individual.

Q. Would that particular consolidation of functions result in some savings in this base budget that you're working from?

A. It would not result in any direct savings because, as has been pointed out, this change did not reduce a position. In fact, it created a position.

Q. How common was that in this reorganization in terms of -- did every move you make end up in a savings to get to this base budget?

A. No, it was a -- involved a number of components. Five positions which were vacant at the time that I was going through this analysis were kept vacant and eradicated. There were nine positions that were lost to reduction in force. Those were the nine positions that had -- that were occupied by people at the time of the reduction.

There were five new positions that were created. There were 40 positions that were moved. They weren't changed significantly, but they were moved within the organization. So we lost the total of 16 positions. We created five. And we move approximately 40. And we modified -- I think we modified 16 positions. I forget how many we modified.

Q. Dr. Fox, in terms of curators that you had dealt with, in your experience, how many of those -- for collections of this magnitude, of this worth, how many of those had been Ph.D.s?

A. Well, if you try to compare the Ocean Drilling Program and its product, the cores are absolutely unique. It's a

record of earth history that is unparalleled in its clarity and its completeness. There's nothing like it. But if you go to other institutions which curate collections that are truly unique -- the meteorite collection at the Museum of Natural History brought some minerals to the Smithsonian.

The vertebral paleontology collection, NASA rocks, you will find that standing at the heads of those collections, those curators are Ph.D. scientists who are carrying out research on the material that they are responsible for archiving and curating.

I thought it was appropriate to have that standard. It was certainly consistent with the history of the program. Dr. Russ Merrill had been the curator. We heard Russ Merrill testify -- or Russ Merrill -- Phil Rabinowitz testify he didn't think it was necessary. But Phil had hired Russ, Russ had been moved three times during the first ten years; and each time he moved from one department to another, curation went with him.

I would say the record indicates that having a curator with the credentials that Russ Merrill had and, later, John Firth had, was most appropriate and consistent with the type of collection that we were responsible for.

Q. Dr. Fox, there was testimony earlier about a man named Bill Reidle who was the curator, I think, of the predecessor program, the Deep Sea Drilling Project?

A. He was the curator at Scripps for a good period of time, yes.

Q. Did you know who Bill Reidle was?

A. Certainly. Bill Reidle was a world-class scientist and professor at the University of California, San Diego, Scripps Institution. Chris Mato was absolutely right, he

did not have a Ph. D., but he had established an international reputation through research, honored with an honorary doctorate, and so he certainly was a exception to the rule.

And I would say that just as background that oceanography is a relatively young field. It started, really, after World War II. And there were a number of examples in that first generation of oceanographers of outstanding scientists who had reputations and research and leadership but did not carry -- had not gone through the full formal educational process and received a Ph.D. Those are very rare individuals today.

Q. What years were the -- what years was the Deep Sea Drilling Project going on?

A. The Deep Sea Drilling Project started in '68, '69 and went through -- I think it ended officially in 1983.

Q. When you made this decision to require a Ph.D., whose decision was that?

A. That was my decision and mine alone.

Q. Had you had any conversations with Rick McPherson about that Ph.D. requirement?

A. Absolutely not.

Q. Did you have any conversations with Jack Baldauf about the Ph.D. requirement before you made the decision?

A. No, I did not.

Q. Did Rick McPherson ever tell you that Chris Mato had helped people complain of sexual harassment?

A. He never told me such a thing.

Q. Did Jack Baldauf ever tell you that Chris Mato had helped people complain of sexual harassment?

A. He certainly did not.

Q. Did Rick McPherson make any effort at all to suggest to you that Chris Mato should be eliminated?
A. Never.
Q. Did Jack Baldauf make any -- make any suggestion to you that Chris Mato needed to be eliminated?
A. Never.
Q. How did you feel about eliminating Chris Mato from the organization, Dr. Fox?
A. I felt the same way I did about other eight individuals, the most horrific decision I have ever made in my life.
Q. Let's talk about the date of this reorganization. It was during this fiscal year?
A. That's correct, December 2nd, 1996.
Q. Okay. So during this year with this base budget, December 2nd of '96. Okay. After the reorganization took place, you have your notes there from Plaintiff's Exhibit 2A from the budgets.
A. Yes, I do.
Q. In fiscal year '97 -- I guess I should have this one in red and this one in black. I'm not sure. I'm sorry. FY '98.
A. October 1st, '97.
Q. October 1, '97 through September 30th –
A. '98.
Q. '98. First let's fill in what was the base budget?
A. Base budget in that year, $34,523,269.
Q. $269 was the base budget. So just off the top, how much did you save in that base budget?
A. Well, just –
Q. Just looking at those numbers.
A. Just looking at those numbers, we saved about $270,000, something like that.

Q. Okay. Now, you told me that ECODP had indicated to you that they wanted this SOE budget to go up every year.

A. That's correct.

Q. Okay. In FY '98, what happened with the SOE budget?

A. In FY '98, we came forward. We identified a series of –

Q. Right now, just give me the total and then, we'll talk about it.

A. The total was $3,197,948.

Q. $948 for -- and the total budget was then?

A. Total of those two was $38,721,217 -- I'm sorry. $37,721,217.

Q. 217 was the total. All right. Dr. Fox, obviously -- well, let's talk about this a little more. You've got about 200 -- 260,000 off the top in just straight savings, money savings.

A. That's correct.

Q. All right. Did you -- is there additional -- are there additional savings represented by this number?

A. Well, there's one thing you should understand, and that is that in 19 -- the year before, we were working in the Atlantic and the south Atlantic. In '98, we moved to the waters of Antarctic, the Indian Ocean, and into the Western Pacific. That created what we call a distant ocean pass. We had increased cost in shipping, increased cost in fuel because we had long transits.

One of our legs went from Kaypound to Totarinas (phonetic) back to Capetown, so we had a lot of underway time, and flying people to remote parts of the world. So we estimated that in that base budget, it is approximately a million dollars that wasn't there the year before because of the distant ocean tax.

So not only did our budget go down approximately 270,000, but our actual cost to do business in our base went up considerably so that you could argue that our savings were even larger because we took on added activities during this period of time.

Q. Okay. Now, anyone just looking at these two budgets, if they say, gee, look at the total here and loot at the total here might conclude what? What would they conclude about this reorganization and cost savings?

A. Well, you could conclude that the budget had gone up 200-and-some-odd thousands. But when you look at where we had -- we were successful in bringing more money or putting more money into special operating expenses, reducing the base budget, and, in fact, if you compare that number, $337,721,000 where the budget was in -- in fiscal year '96, when I came, that budget for the sum of the base and the SOE was $38,123,000.

So with a base budget of $35,863,000, so when we start in '96, when we were sort of operating in our old style, we had made considerable progress in reducing the base, increasing our commitment to long-range innovation, and reducing our bottom line, as well.

# APPENDIX E

[Excerpt from trial transcript dated February 29, 2000, of Christine Mato]

[Vol. 5:183]

Christine Mato

having been first duly cautioned and solemnly sworn to tell the truth, the whole truth, and nothing but the truth was examined and testified as follows:

CROSS EXAMINATION

BY MS. WILSON:

Q. Well, you're claiming that your salary was unequal to males, aren't you?
A. That's correct.
Q. You never made a complaint about that, did you?
A. I asked for raises and promotions.
Q. My question, Ms. Mato, is did you make a complaint about that? Did you say, "I'm unequally paid to males, this is discrimination. Somebody's got to do something about this"? Did you make a complaint? Do you know what a complaint is?
A. I complained that men were being paid and given raises and promotions when I had been told that they were frozen.
Q. Did you ever make any sort of a formal complaint?

A. Going to my supervisor and saying that sounds a little formal to me.

Q. I'd like to show you your deposition, page 371. Question: "Did you ever complain while you were at A&M about your -- about your pay and the fact that there was discrimination in your pay?" What was your answer?

A. I said "Yes."

Q. And I said: "To whom did you complain?" What was your answer?

A. "Okay. Like I said before, I complained to Russ Merrill, I complained to Jeff Fox, and I complained to Rick McPherson."

Q. And then, I said, "What I'm actually talking about is a slightly different issue. Did you ever say to anybody, just like I asked you a minute ago, 'Look, this is what I make, but my -- but my job is equal to this man over here and he's making more than me and that's discrimination'"?

"Did you ever -- did you ever do that, complain about that kind of discrimination in your pay?" What was your answer, Ms. Mato?

A. My answer was "No."

Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-1233

In The
# Supreme Court of the United States

Christine Mato,
*Petitioner,*

v.

Jack Baldauf, Dr.; Jeff Fox, Dr.; Texas A&M University System; Texas A&M University; and Texas A&M University Ocean Drilling Program,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

LANNY D. RAY
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*Counsel for Petitioner*

P9512

## QUESTION PRESENTED

Will the Court of Appeals for the Fifth Circuit be allowed to continue to circumvent this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), under the guise of insufficiency of the evidence by ignoring and discrediting evidence favorable to plaintiffs?

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## REPLY TO BRIEF IN OPPOSITION

Petitioner Christine Mato ("Petitioner") has sought this Court's review of the United States Fifth Circuit Court of Appeals' ("Fifth Circuit") reversal of her jury verdict on the precise grounds that the Fifth Circuit has, again, contravened this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), under the guise of sufficiency of the evidence. Petitioner has complained that the Fifth Circuit has ignored and discredited the evidence favorable to Petitioner despite this Court's clear guidance and direct admonishment not to do so. Respondents have filed a brief in opposition which can only be characterized as arrogant. But it is an arrogance born of countless "victories" before the Fifth Circuit where, as argued in the Petitioner's original Petition ("Petition"), the default value is that the civil rights plaintiff loses.[1]

Respondents plead that this Court should not grant the Petition on two grounds. First, Respondents argue (factually) that Petitioner failed to put on sufficient evidence. However, Respondents, like the Fifth Circuit, fail to understand the standard of review as set out in *Reeves*, and do not consider the evidence favorable to the verdict. Respondents instead ignore, discredit, and spin it in a light unfavorable to Petitioner, and actually rely on a significant amount of evidence only favorable to Respondent.

After casting aside all of Petitioner's evidence, Respondents then contend that Petitioner's case is not worthy of review. In doing so, however, Respondents inadvertently demonstrate that this is precisely the type of case that merits this Court's attention. Respondents rely on the false hope that this Court's general rule against reviewing factual determinations will insulate the Fifth Circuit's blatant and habitual disregard of the standard of review in

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[1]Loss defined in practical terms meaning everything from total reversal of a trial victory to a decrease of damages to the point that the award could not possibly exceed the attorneys fees spent in prosecuting the case. See Section III of Petition.

such cases. However, it was just such a factual determination in *Reeves* which prompted this Court to admonish and reverse the Fifth Circuit. Indeed, whether the Fifth Circuit will be allowed to continue to circumvent *Reeves* is precisely the question presented by Petitioner. Respondents fail to counter Petitioner's argument that the Fifth Circuit has so routinely found against civil rights plaintiffs that their decisions have had (or should have) a chilling effect on the bringing of such cases in the circuit. Rather than point to numerous cases favorable to civil rights plaintiffs, Respondents have instead provided only a few cases, and the cases provided, when reviewed, actually favor granting the Petition.

## I. Respondents Merely Endorse the Fifth Circuit's Erroneous Application Of The Evidentiary Standard In Discrimination Cases Proven Through Indirect Evidence

After claiming that Petitioner has made "numerous misstatements of fact," Respondents fail to demonstrate any. Instead, Respondents merely parrot the Fifth Circuit's recitation of facts from the opinion wherein, as shown in the Petition, the Fifth Circuit relied upon evidence and testimony unfavorable to Petitioner and the verdict. Notably, Respondents, like the Fifth Circuit opinion, routinely rely on the testimony of defendant Fox, who of course denied that he was motivated by retaliation. For example, Fox's testimony that his focus on science operations was his reason for adding the Ph.D. requirement, see Brief in Opposition at 14 ("Br. in Opp. at 14"), is hardly "undisputed." Petitioner put on ample evidence to controvert Fox's testimony. The jury did not believe Fox. Indeed, as mentioned in the Petition, the District Court even noted his disbelief of Fox's testimony. Pet. at 15.

Petitioner has accurately portrayed the evidence and testimony. Where there could be a question, Petitioner quoted the testimony to avoid the appearance of "spinning." Pet. at 12 (discussing a portion of the testimony of Jan Radle to demonstrate the Fifth Circuit's discounting of critical testimony). Respondents, however, accuse

Petitioner of taking testimony out of context, and then do exactly that. Despite providing it in their appendix C, Respondents ignore the final line of Radle's testimony wherein she states that it appeared *to her* as if Petitioner were being specifically targeted. Respondents nevertheless arrogantly accuse Petitioner of misleading with an out-of-context passage.

Respondents continue by providing and only addressing various excerpts of testimony while ignoring and failing to address the evidence favorable to the verdict. Where is the discussion of the rest of Chavis' testimony? She testified repeatedly that the positions were very similar and the only difference she could recall was the Ph.D. requirement. She also testified that she had questions as to "why would you create a position that has such similar duties to a position that you're laying someone off in?" As discussed above, Radle testified that it appeared to her as if Petitioner were being specifically targeted. Radle also testified that Chavis had asked Radle, "are we specifically excluding [Petitioner]?" and that Chavis had "absolutely" referred to Petitioner by name. Chavis did not deny making the comment and stated that she did not recall. Notably, she claimed that she did not recall to so many questions that the District Court took issue with her lack of recall and Respondents' failure to allow her to refresh her memory between deposition and trial.

Additionally, Respondents do not address Petitioner's widely known "frequent flyer" label or why the jury could not infer Fox's knowledge of Petitioner's protected activities from this common knowledge. Respondents do not counter that the jury can infer that the Ph.D. was a pretext when Respondents' own employees did. Instead Respondents only reargue the facts and claim that what was said was not.

Respondents attempt to reinvent the testimony of Fox regarding early drafts that he destroyed. Again, to avoid the appearance of spinning, the testimony elicited by Petitioner's counsel while taking Fox on voir dire regarding the admission of the consultant's recommendations:

Q: Did you -- do you know where the original drafts are?
A: Those original drafts do not exist.
Q: Did you destroy those original drafts?
A: I did destroy them.

The testimony was that Fox had interacted throughout and an early draft would have corroborated or refuted Fox's claim that the Ph.D. requirement had been there from the outset.

A perfect example of Respondents' attempt to mischaracterize favorable evidence is their discussion and endorsement of the Fifth Circuit's discounting of the evidence that the Ph.D. requirement was unnecessary. Like the Fifth Circuit, Respondents contend that the testimony of several witnesses that the Ph.D requirement was unnecessary is merely "disagreement" and thus "no evidence of pretext." Br. in Opp. at 14-15. However, testimony that the Ph.D. requirement is unnecessary *is evidence* that the Ph.D. requirement is unnecessary. That a requirement is unnecessary can lead to the conclusion that it is a pretext. And because we are to take evidence in a light favorable to the verdict, all testimony that the Ph.D. requirement was unnecessary supports the verdict. It is this consistent misapplication of the standard of review that warrants granting the Petition.

While taking Fox's testimony (unfavorable to the verdict) at face value, Respondents discount the testimony of Petitioner and fail to seriously address any of her relevant testimony regarding the similarity of the positions, her open assistance in making complaints, that she was told she embarrassed the organization and would never get another raise, that she did not get another raise, and that she complained directly to Fox. Respondents instead provide the botched impeachment by semantics where Petitioner admitted that she did not use certain specific words when she complained to Fox and others. Respondents again leave out critical parts of the testimony despite providing them to the Court. Contrary to Respondents' bold statement that Petitioner never testified that she complained to Fox about being paid less than white males, she testified in trial and in deposition "yes"

to the question, "Did you ever complain . . . about your pay and the fact that there was discrimination in your pay?" She answered, " . . . I complained to Jeff Fox . . ." to the follow-up question of, "To whom did you complain?" That she did not use the words, "my job is equal to this man over here and he is making more than me and that's discrimination" does not change the fact that she testified (on cross) that she complained directly to Fox about discrimination. Indeed, Respondent has provided the Court with some evidence that Fox was aware of Petitioner's protected activities.

A final dishonesty in the response must be addressed. Respondents put forth the false contention that Petitioner claimed the entire reorganization was concocted solely to get rid of her. Br. in Opp. at 11. There is nothing in the record to support this absurd contention. Petitioner pleaded and proved that Respondents used the reorganization as a pretext to terminate her. Specifically, she pleaded and proved that the addition of the Ph.D. requirement was a pretext to justify her termination. Using the reorganization as a pretext is far different than concocting the *entire* reorganization just to get rid of Petitioner. Nor does Fox's testimony that the reorganization saved money counter the truly undisputed evidence that the reorganization of Petitioner's former position did cost more. Her replacement was paid significantly more than she was, and no positions were eliminated. This semantics game of constructing a "straw dog" pleading which is then easily countered only illustrates Respondents' arrogance. Additionally, it is a new factual argument (seen first on appeal) which has no place in a proper analysis of evidentiary sufficiency under the correct standard of review.

Respondents do not oppose the Petition with any issues or contradictions of evidence that would alter the analysis. Rather they simply endorse and perpetuate the Fifth Circuit's misapplication of standard of review for which this Court reversed them in *Reeves*. Recasting of evidence in a light favorable to the losing party at trial is improper. Likewise, the disbelieved testimony of the individual found guilty of retaliation by the jury has no place in a proper analysis of sufficiency of the evidence where only the evidence favorable to the

verdict is to be considered. Respondents, like the Fifth Circuit, are conducting a *de novo* review and reargue their factual case — a case already found lacking by the jury.

## II. The Question Presented is Important

Respondents contend that this case is unworthy of this Court's attention primarily arguing that it is only this case which will be affected because factual sufficiency is a case-by-case analysis. As mentioned earlier, *Reeves* itself was just such a case that Respondents argue should not be reviewed, and this Court saw the need to correct the Fifth Circuit's misapplication of the law there. Additionally, Respondents' reliance on the general principle that this Court does not review factual determinations is misplaced because this case, like Reeves, is not a question of factual determinations, but rather a misapplication of the evidentiary burden borne by plaintiffs proving their cases with circumstantial evidence. Significantly, where a Court of Appeals decides an important question in a way that conflicts with relevant decisions of this Court, review is warranted. See SUP. CT. R. 10(c).

More importantly, under Respondents' argument, the Fifth Circuit's refusal to follow Reeves would never be subject to review, regardless. Where would this leave those wrongfully discriminated against in the Fifth Circuit? Without a remedy. Thus, if not this case, then when? How many is too many? How long will the Fifth Circuit be allowed to evade review by hiding behind the guise of evidentiary sufficiency?

As to the Fifth Circuit's case history, this Court is well aware of the Fifth Circuit's opinions subsequent to *Reeves,* and Petitioner will not belabor the point beyond the cases cited as illustrations in her Petition. However, Respondents' selection of cases which they contend go against granting the Petition are worthy of discussion.

*Pratt v. City of Houston*, 247 F.3d 601 (5th Cir. 2001), cited by Respondents is inapposite and does not affect our analysis for two

reasons. First, it is a summary judgment case and not a review of a judgment as a matter of law following a plaintiff's jury verdict. Secondly, and more importantly, since it was but a summary judgment, the City of Houston is far from defeated. If ultimately unsuccessful before the jury of twelve at trial, the city will get yet another chance before the Fifth Circuit jury of three, who in all likelihood will either reverse the verdict or at a minimum decimate it. The *Pratt* case does demonstrate one reason these cases are so expensive. Before succeeding against a state defendant, a typical civil rights plaintiff (who usually has a 42 U.S.C. § 1983 action as well) can expect up to three trips to the Court of Appeals — once for an initial qualified immunity determination on the pleadings, again for qualified immunity at the summary judgment stage, and finally after a winning verdict.

*Gee v. Principi*, No. 01-50159, 2002 WL 597374 (5th Cir. Apr. 18, 2002), to which Respondents devote most of their time and attention, is likewise a summary judgment case so Gee is still far from prevailing against the Department of Veterans Affairs. Additionally and significantly, Respondents fail to mention that it was a two to one opinion with one justice dissenting. Notably, the dissent assumed the same fictional wall of silence between those with proven improper motives and the final decision maker that the Fifth Circuit assumed in the instant case,[2] and would not let the plaintiff get beyond summary judgment. *Id.* (Garza, J., dissenting). That a plaintiff occasionally survives by means of a "lucky panel" only to run the gauntlet again if successful at trial does nothing but buttress the reasons for granting this Petition.

Finally, *Oden v. Oktibbeha County*, 246 F.3d 458 (5th Cir.) *cert denied*, 122 S.Ct. 341 (2001), particularly demonstrates the chilling effect that the Fifth Circuit is having on civil rights plaintiffs. While Respondent's parenthetical that the court affirmed the jury's compensatory award is correct, what is truly significant about *Oden* is that the Fifth Circuit reversed the bulk of the jury verdict and award leaving only the $20,000 in compensatory damages for the sheriff's

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[2]See Petition at 16.

discrimination. $20,000 is hardly a victory in a case against a state which routinely costs ten times that amount to prosecute. This case illustrates Petitioner's argument that no reasonable counsel will take these cases on contingency and no honest counsel will take them for paying clients.[3]

That Respondents could not produce any, much less several, cases where the Fifth Circuit has actually affirmed a substantial jury award for a plaintiff, speaks for itself. That those cases cited demonstrate the frustration of prosecuting a civil rights action in the Fifth Circuit only reinforces the reasons for granting the Petition.

This question is important if the redress of civil rights violations is to survive in the Fifth Circuit. Neither the possibility of an award of one tenth the cost to prosecute the case, nor the false temporary victory of not being thrown out at summary judgment only to again run the Fifth Circuit gauntlet on appeal, nor the thin hope for a lucky panel alter that eventuality.

Respectfully submitted,

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*Chistine Mato*

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[3]See Section III of Petition.